DePaul University
UNIVERSITY LIBRARIES

DePaul Journal of Health Care Law

Volume 2
Issue 3 *Spring 1999*

Article 7

November 2015

Case Notes

DePaul College of Law

Follow this and additional works at: https://via.library.depaul.edu/jhcl

Recommended Citation

DePaul College of Law, *Case Notes*, 2 DePaul J. Health Care L. 639 (1999)
Available at: https://via.library.depaul.edu/jhcl/vol2/iss3/7

This Case Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Health Care Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

Merger of Leading Wholesale Distributors Enjoined Pending FTC Review

The United States District Court for the District of Columbia granted the Federal Trade Commission's (FTC) motion for injunctive relief pending administrative review against the proposed merger of four leading wholesale drug distributors, under the Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).[1]

Defendants, four of the largest wholesale drug distributors in the United States,[2] responding to industry trends in wholesale drug sales, publicly announced in 1997 plans to merge.[3] After learning of the planned merger, the FTC commenced anti-trust proceedings in early 1998 under the authority of the Federal Trade Commission Act, § 13.[4] The same year, the FTC brought a motion in district court to enjoin defendants' proposed merger pending FTC administrative review.[5]

The district court upheld plaintiff's motion when it found plaintiff would likely succeed on a claim under Section 7 of the Clayton Act, 15 U.S.C. § 18.[6] In its analysis, the court considered the effect of the proposed merger on the relevant wholesale market.[7] The court concluded were the proposed merger was to occur, the number of national wholesale distributors would be reduced to two corporations.[8] Furthermore, the court found there would be substantial antitrust implications because the two corporations would control over eighty percent of the relevant wholesale market.[9] Therefore, the court granted the FTC's motion requesting an injunction against defendants' merger, pending a full hearing by FTC.[10] *Federal Trade Commission v. Cardinal Health, 12 F. Supp. 2d 34 (D.D.C. July 31, 1998).*

---

[1]Federal Trade Comm'n v. Cardinal Health, 12 F. Supp. 2d 34, 68 (D.D.C. 1998).
[2]*Id* at 36.
[3]*Id* at 42-43.
[4]*Id* at 44.
[5]*Id.*
[6]*Cardinal Health*, 12 F. Supp. 2d at 66.
[7]*Id.*
[8]*Id.*
[9]*Id.* at 67.
[10]*Id.* at 68.

CONSTITUTIONAL LAW

Promotion of Off-Label Uses for Prescription Drugs Protected by First Amendment

The United States District Court for the District of Columbia held Food and Drug Administration (FDA) restrictions of drug manufacturers' promotions of prescription drug off-label uses at educational seminars violated the commercial speech provisions of the First Amendment of the United States Constitution.[11]

In 1996, the FDA issued policies in its Guidance Documents imposing restrictions on drug manufacturers regarding the distribution of medical texts and peer-reviewed journal articles at Continuing Medical Education seminars (CME's).[12] Specifically, the Guidance Documents stated manufacturers' promotions of off-label uses for prescription drugs and devices would constitute misbranding, a violation punishable under the Food, Drug & Cosmetic Act.[13] Plaintiff, a nonprofit public interest law and policy center, sued to enjoin the FDA and the Department of Health and Human Services (HHS) from enforcing the policies under the theory it violated manufacturers' First Amendment rights of free speech.[14]

The district court found drug manufacturers' promotions of off-label uses for prescription drugs through the distribution of text and journal reprints at CME's was commercial speech, not conduct, under the First Amendment.[15] The court reasoned pharmaceutical manufacturers would be likely to use and disseminate research studies promoting off-label uses for their products rather than research studies advising against a particular off-label use.[16] Additionally, the research promoting the off-label use would be more likely to reach physicians.[17] Thus, the court found a potential to harm and mislead existed, which is the reason commercial speech is held to a less exacting standard.[18] Furthermore, the court found, although the FDA had a substantial interest in preventing the promotion

[11]Washington Legal Found. v. Friedman, 13 F. Supp. 2d 51, 74-75 (D.D.C. 1998).
[12]*Id* at 54.
[13]*Id* at 55.
[14]*Id* at 59; (*see* U.S. Const. Amend I).
[15]*Id.* at 65; (*see* U.S. Const. Amend I).
[16]*Friedman*, 13 F. Supp. 2d at 65.
[17]*Id.*
[18]*Id.*

of off-label uses of prescription drug and devices by manufacturers, the Guidance Documents were more restrictive than necessary to serve that interest under the test set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York.*[19] Therefore, the court held the FDA's Guidance Documents unconstitutionally restricted drug manufacturers' right to commercial speech.[20] Accordingly, the court granted plaintiff' motion.[21] *Washington Legal Foundation v. Friedman, 13 F. Supp. 2d 51(D.D.C. 1998).*

Coal Industry Retiree Health Benefit Act Violates Takings Clause

The Supreme Court of the United States found the Coal Industry Retiree Health Benefit Act (Act), as it applied to a former coal operator, Eastern Enterprises (Eastern), constituted an unlawful taking under the Fifth Amendment to the United States Constitution.[22]

The Act provided medical benefits to coal workers and their dependents through premiums assessed against any coal operators who had previously been required to make contributions under an earlier health benefit plan.[23] Plaintiff left the coal industry in 1965 and assigned all its rights and obligations pertaining to coal mining to a subsidiary.[24] However, under the Act's allocation scheme, plaintiff assumed the responsibility for premiums for over 1,000 retired miners who had been employed with the company before 1966.[25] Because of this allocation scheme, plaintiff filed suit alleging the Act violated its due process rights and constituted a taking in violation of the Fifth Amendment.[26]

The court addressed plaintiff's Fifth Amendment claim that the Act violated the takings clause by examining three factors: the economic impact on plaintiff, the interference with plaintiff's investment-backed

---

[19]*Id.* at 71 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980)).

[20]*Id.*

[21]*Id.* at 74.

[22]Eastern Enter. v. Apfel, 118 S. Ct. 2131, 2153 (1998) (plurality opinion).

[23]*Id.* at 2142.

[24]*Id.* at 2143.

[25]*Id.*

[26]*Id.*; (*see* U.S. Const. Amend V).

expectations and, finally, the character of the government action.[27] First, the court found the economic impact on plaintiff to be substantial because it imposed a severe, retroactive burden, which would cost plaintiff between 50 and 100 million dollars.[28] Next, the court determined the degree of impact the Act would impose upon plaintiff's reasonable investment-backed expectations.[29] Because the Act's scope extended thirty years into the past by imposing a burden based upon plaintiff's activities at that time and did not relate to any commitment or injury assumed by plaintiff, the court found the act substantially interfered with plaintiff's reasonable investment-backed expectations.[30]

Finally, the court held the government action in seeking to assure health care for retired miners did not outweigh the severe economic impact and the grave interference upon reasonable investment-backed expectations.[31] Consequently, the court held the Act constituted an unlawful takings in violation of the Fifth Amendment.[32] *Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998) (plurality opinion).*

HIV Testing of Arrestee Constitutional

The Supreme Court of Georgia held arrestees' rights of privacy, equal protection rights, and Fourth Amendment rights were not violated by compelling arrestees to submit blood samples for human immunodeficiency virus (HIV) testing pursuant to OCGA § 17-10-15(b).[33] The statute permitted a victim of a crime, who faced significant exposure to HIV during commission of the crime, to require the arrestee to submit a blood sample for HIV testing upon arrest.[34]

On October 3, 1997, arresting officers of the Waycross Police Department attempted to arrest defendant.[35] In the course of the arrest,

---

[27]*Eastern*, 118 S. Ct. at 2146.
[28]*Id.* at 2149.
[29]*Id.* at 2151.
[30]*Id.*
[31]*Id.* at 2153.
[32]*Eastern*, 118 S. Ct. at 2153.
[33]Adams v. State, 498 S.E.2d 268, 269 (Ga. 1998).
[34]*Id.*
[35]*Id.* at 269.

defendant attacked the officers.[36] During the altercation, blood seeped from a previous wound on defendant's hand through a bandage. Meanwhile, one of the officers cut his finger while subduing defendant.[37] The officer later testified his bleeding finger touched defendant's wound, but he was uncertain whether his blood came into contact with defendant's.[38] Defendant did not exhibit any physical indications of acquired immune deficiency syndrome (AIDS).[39] The State filed a motion to compel defendant to submit a blood sample for HIV testing, which the trial court granted.[40] Defendant requested a stay pending appeal, which was denied.[41]

The first issue addressed by the court was whether OCGA § 17-10-15(b) which permitted the State to obtain a sample, violated the Fourth Amendment of the United States Constitution.[42] The court held the statute did not violate the Fourth Amendment.[43] The court began its analysis by finding the obtaining of blood samples a bodily intrusion, and thus, a search and seizure under the Fourth Amendment.[44] However, the court noted, the Fourth Amendment only bans "unreasonable" searches and seizures.[45] Reasonableness, the court continued, is measured through a determination of probable cause, but probable cause determinations can be found impracticable when situations exceed the ordinary needs of law enforcement.[46] The court applied a balancing test to determine whether the government's need to conduct the search outweighed the interests of the individual.[47] The court found the needs of the government to promote public health and safety by slowing the spread of HIV were significant and substantial, while the intrusion to the individual was minimal.[48] In addition, the results of the test were excluded from use against the arrestee

---

[36]*Id.*
[37]*Id.* at 270.
[38]*Adams*, 498 S.E.2d at 270.
[39]*Id.*
[40]*Id.*
[41]*Id.*
[42]*Id.*; (*see* U.S. Const. Amend IV).
[43]*Adams*, 498 S.E.2d at 271.
[44]*Id.*
[45]*Id.*; (*see* U.S. Const. Amend IV).
[45]*Adams*, 498 S.E.2d at 271.
[47]*Id.*
[48]*Id.*

in any criminal proceeding.[49] Therefore, the interests of the government outweighed those of the individual.[50]

The second issue addressed by the court was whether OCGA § 17-10-15(b) violated an individual's right of privacy.[51] In holding OCGA § 17-10-15(b) violated the right of privacy under the Fourteenth Amendment, the court again focused on the government's interest in protecting the public from the spread of HIV.[52] The court found the state's interest compelling and the test conducted in the least intrusive manner.[53] Noting the results were only available to the victim and public health authorities, the court concluded there was no violation of the individual's right of privacy under the Fourteenth Amendment.[54]

In resolving the third issue regarding an individual's equal protection rights, the court found OCGA § 17-10-15(b) did not infringe upon a fundamental right or a suspect class.[55] Furthermore, the court found a rational relationship existed between the government's interest in slowing the spread of HIV and the likely cause of HIV infection in cases in which a risk of exchange of bodily fluids during commission of a criminal offense existed.[56] The court affirmed the motion compelling arrestee to submit to testing. *Adams v. State, 498 S.E.2d 268 (Ga. 1998).*

CONTRACTS

Covenant Not to Compete Unenforceable

The United States District Court for the District of New Jersey granted summary judgment against plaintiff medical graft producer's breach of contract claim for breach of covenant not to compete in the sale of

[49] *Id.* at 272.
[50] *Id.*
[51] *Adams,* 498 S.E.2d at 272.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Adams,* 498 S.E.2d at 272 (citing People v. Adams, 597 N.E.2d 574 (Ill. 1992); Benton v. State, 461 S.E.2d 202 (Ga. 1995)).

vascular graft products.[57] The court held the covenant was unenforceable.[58]

Plaintiff had been contractually involved with defendant distribution company for many years.[59] Defendant was the exclusive distributor for plaintiff's products.[60] On December 6, 1994, a contract had been executed between the parties granting defendant exclusive rights to sole distribution of plaintiff's products.[61] Included in the contract was a covenant not to compete clause.[62] The substance of the clause barred defendant from conducting any sales of products or services for the purpose of competing with plaintiff. On December 31, 1996, the contract between the parties was terminated when plaintiff decided against renewal.[63] In August of 1996, three executives of defendant company began to explore the possibilities of starting a separate company for the purpose of selling graft products.[64] The three executives incorporated their new company, Orion Medical, Inc. (Orion) in September 1996,[65] but they remained employees of defendant.[66] The three executives decided the covenant not to compete between defendant and plaintiff would not be breached by Orion's operations.[67]

The issue before the court was whether sales by Orion in direct competition with plaintiff violated the parties' covenant not to compete.[68] The court held the covenant unenforceable.[69] The court applied New Jersey law governing contracts, which held covenants not to compete could only be enforced if reasonable.[70] Three factors, the court concluded, determined reasonableness.[71] First, the covenant must be necessary to protect both parties' legitimate interests.[72] Second, the covenant could not

---

[57]Meadox Med., Inc. v. Life Sys., Inc., 3 F. Supp. 2d 549, 554 (D.N.J. 1998).
[58]*Id.*
[59]*Id.*
[60]*Id.*
[61]*Id.*
[62]*Meadox*, 3 F. Supp. 2d at 550.
[63]*Id.*
[64]*Id.* at 551.
[65]*Id.*
[65]*Id.*
[67]*Meadox*, 3 F. Supp. 2d at 551.
[68]*Id.*
[69]*Id.* at 554.
[70]*Id.* at 552 (citing Solari Industries, Inc. v. Malady, 264 A.2d 53 (1970)).
[71]*Id.*
[72]*Meadox*, 3 F. Supp. 2d at 552.

cause undue hardship to the former employee.[73] Third, the covenant must be acceptable under public policy reasons.[74] Plaintiff had asserted two interests to be protected.[75] First, plaintiff asserted its confidential pricing information and strategies, and customer relationships needed protection.[76] Second, plaintiff asserted defendant violated proprietary information to breach the covenant.[77]

The court found defendant's customer-base to be independent of the contract with plaintiff.[78] Defendant, the court continued, developed its own customer contacts from which it sold plaintiff's products.[79] Also, the court found the language of the contract between the parties supported that interpretation.[80] Accordingly, defendants' motion for summary judgment was granted.[81] *Meadox Medicals, Inc., v. Life Sys., 3 F. Supp. 2d 549 (D.N.J. 1998).*

DAMAGES

Maintenance of Life Support Against Wishes of Next-of-Kin Medical Battery

The Appellate Court of Illinois, Second District, held a daughter, whose father received medical treatment without the consent of next of kin, adequately stated a claim for medical battery and intentional infliction of emotional distress.[82] Her father was maintained on life support despite stipulations to the contrary in a living will, as well as the expressed wishes of his family.[83]

Plaintiff's father sought treatment in hospital's emergency room.[84] Plaintiff's mother granted consent for cardiac tests, including an

---

[73] *Id.*
[74] *Id.* (citing A.T. Hudson & Co. v. Donovan, 524 A.2d 412 (1987)).
[75] *Id.*
[76] *Id.*
[77] *Meadox*, 3 F. Supp. 2d at 552.
[78] *Id.* at 553.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] Gragg v. Calandra, 696 N.E. 1282, 1290 (Ill. App. Ct. 1998).
[83] *Id.*
[84] *Id.*

angiogram, on behalf of plaintiff's father.[85] During cardiac catherization, plaintiff's father suffered cardiac arrest, rendering him comatose and making his survival impossible.[86] Nevertheless, defendant physician performed open-heart surgery on plaintiff's father during which the father sustained irreversible brain damage requiring life support.[87] Plaintiff alleged defendant performed the open-heart surgery without first obtaining the consent of the next-of-kin.[88] Plaintiff also alleged the hospital maintained her father on life-support despite the wishes of the next of kin and her father's living will, which declined life-sustaining measures.[89]

The appellate court reversed the trial court's dismissal of Count I against defendant hospital, which stated a claim under the Family Expense Act (FEA).[90] The trial court concluded the death of the patient's spouse and plaintiff's mother abated any cause of action under the FEA, but the appellate court held recovery survived the death of the spouse when recovery rested on liability and was not a statutory creation.[91] The court agreed with plaintiff's argument the cause of action was battery, not malpractice as defendant hospital maintained[92] because there were no allegations of deviations from proper medical standards.[93] The court further reasoned the hospital could be held vicariously liable for the intentional torts of physicians, who used the hospital's facilities to provide care.[94] The court dismissed Count II for failure to state a claim under the Consumer Fraud Act because plaintiff failed to show a connection between the potential injuries and alleged misrepresentations in the hospital's advertising.[95]

The court reversed the trial court's dismissal of claims of intentional infliction of emotional distress.[96] The court reasoned defendant's repeated accusations plaintiff and patient's wife were trying to kill the patient did amount to extreme and outrageous conduct because defendant knew

---

[85] *Id.*
[86] *Id.* at 1284.
[87] *Gragg*, 696 N.E.2d at 1285.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 1286; (*see* 750 ILL. COMP. STAT. 65/15 (West 1996)).
[91] *Id.*
[92] *Gragg*, 696 N.E.2d at 1286-87.
[93] *Id.* at 1287-88.
[94] *Id.*
[95] *Id.* at 1288; (*see* 750 ILL. COMP. STAT. 65/15 (West 1996)).
[96] *Gragg*, 696 N.E.2d at 1290.

plaintiff and patient's wife were susceptible to emotional stress, and maintenance of life-support would negatively impact their emotional states.[97] Thus, the court affirmed in part, reversed in part, and remanded with directions.[98] *Gragg v. Calandra, 696 N.E.2d 1282 (Ill. App. Ct. 1998).*

DISABILITY

Pregnancy-Related Disorders May Qualify As a Disability

The United States District Court for the Northern District of Illinois, Eastern Division held pregnancy may qualify as a disability under the Americans With Disabilities Act (ADA) when abnormal conditions related to pregnancy substantially affect major life activities.[99]

Plaintiff, a probationary data entry operator with the Chicago Police Department, suffered from back pain, stomach pain, and swelling limiting her ability to stand.[100] Plaintiff's supervisor forced her to do heavy labor despite physician's orders plaintiff engage in light work only.[101] Noting plaintiff "could not work quickly enough" and had missed five days of work in six months, the supervisor fired her.[102] Plaintiff subsequently delivered two months prematurely.[103]

In determining whether complications related to pregnancy may be considered a disorder under the ADA, the court ultimately applied *Hernandez v. Hartford.*[104] The *Hernandez* decision relied on *Dorland's Medical Dictionary*, The American Medical Association's Council on Scientific Affairs, and the *Journal of the American Medical Association* in distinguishing normal complications of pregnancy from "physiological disorders."[105] Expert testimony agreed a woman undergoing a normal

---

[97] *Id.*

[98] *Id.*

[99] Gabriel v. City of Chicago, 9 F. Supp. 2d 974 (N.D. Ill. 1998); *see* Americans With Disabilities Act, § 2, 42 U.S.C.A. § 12101 (1990).

[100] *Id.* at 976.

[101] *Id.*

[102] *Id.* at 977.

[103] *Id.*

[104] *Gabriel,* 9 F. Supp. 2d at 980 (citing Hernandez v. Hartford, 959 F. Supp. 125, 130-31 (D. Conn 1997)).

[105] *Id.*

pregnancy should be able to carry out her employment responsibilities until the onset of labor.[106] However, a complication, such as premature labor, qualified as a physiological disorder because it was an "abnormal functioning of the body."[107] The court held plaintiff produced sufficient evidence for a reasonable juror to conclude she suffered an impairment affecting the major life activity of standing.[103]

Accordingly, the court denied defendant's motion for summary judgment.[109] *Gabriel v. City of Chgo., 9 F. Supp. 2d 974 (N.D. Ill. 1998).*

Objective Standard Determines Adverse Employment Action under ADA

The United States Court of Appeals for the Eleventh Circuit held an objective standard should apply to considerations of factors in adverse employment actions under the American with Disabilities Act (ADA).[110]

After plaintiff teacher told defendant school district he was human immunodeficiency virus (HIV) positive, the school district proposed transferring him from a psycho-education classroom reserved for students with severe behavioral problems to an interrelated classroom for students with mild disorders.[111] The school district had three classroom levels for students with special needs.[112] The psycho-education classroom was reserved for students with severe behavioral disorders.[113] Students in the psycho-education classroom were often aggressive and had been known to bite.[114] Plaintiff had a Georgia certificate in psycho-educational teaching and was personally devoted to teaching in a psycho-education classroom.[115] When the school board attempted to transfer him to an interrelated classroom, the plaintiff sought a permanent injunction barring the transfer.[116] Plaintiff claimed protection under the ADA on the basis of

---

[106] *Id.*
[107] *Id.*
[103] *Id.* at 982.
[109] *Gabriel,* 9 F. Supp. 2d at 983.
[110] Doe v. Dekalb County School Dist., 145 F.3d 1441, 1454 (11th Cir. 1998).
[111] *Id.* at 1443.
[112] *Id.*
[113] *Id.*
[114] *Id.* at 1444.
[115] *Doe,* 145 F.3d at 1444.
[116] *Id.*

his HIV status and because he would suffer an adverse employment action by being transferred.[117] The district court granted the plaintiff a permanent injunction and required the School Board to reinstate him in the psycho-education classroom.[118]

The appellate court found the district court failed to make any factual findings to assist the appellate court's review.[119] The appellate court, therefore, remanded the case back to the district court for application of the tests adopted by the appellate court.[120] The main issue before the appellate court was whether an adverse employment action should be based on an objective or subjective analysis.[121] The court held it should be based on a reasonable person, objective analysis.[122] Under that analysis, the court found plaintiff's personal devotion to teaching in a psychoeducation classroom could not be taken into account. Rather the court should have examined issues such as whether completing ten credit hours over three years to receive certification in interrelated teaching was adverse.[123] After providing the test, the appellate court vacated the injunction and remanded the case.[124] *Doe v. DeKalb Cty. School Dist., 145 F.3d 1441 (11th Cir. 1998)*

Transient Condition May Be Construed As Disability Under ADA

The United States Court of Appeals for the Tenth Circuit held workers' impairment could meet the substantially limiting requirement of the Americans with Disabilities Act (ADA) even before permanent disability ratings had been issue by treating physicians.[125] The court further concluded workers were not judicially estopped from pursuing ADA claims because they had applied for and received benefits under the

---

[117] *Id.* at 1444-45.
[118] *Id.* at 1445.
[119] *Id.* at 1446.
[120] *Doe*, 145 F.3d at 1446, 1454.
[121] *Id.* at 1447.
[122] *Id.* at 1448-49.
[123] *Id.* at 1452.
[124] *Id.* at 1454.
[125] Aldrich v. Boeing Co. 146 F.3d 1265, 1267 (10th Cir. 1998).

employer's private disability plan and state Worker's Compensation law.[126]

Plaintiff worked for defendant as an assembly line worker for approximately four years before receiving a diagnosis of flexor tendon tenosynovitis.[127] Plaintiff was restricted from engaging in numerous activities, including continuous grasping, pushing, or pulling.[128] Plaintiff later received a permanent partial impairment rating of fifteen percent from his orthopedic surgeon.[129] Prior to receiving a permanent disability rating, defendant terminated him.[130]

Defendant contended, absent a permanent disability rating, it had no duty to accommodate the plaintiff under the ADA.[131] The court rejected defendant's argument holding determinations of disability status under the ADA should be made on a case-by-case basis, and "are not susceptible to *per se* rules."[132] The court also noted the EEOC guidelines "clearly state that an impairment need not be permanent in order to rise to the level of a disability."[133] The court further maintained the evidence was clearly sufficient to establish that plaintiff's condition was "substantially limiting."[134] Questions of material fact remained, however, regarding whether plaintiff was "otherwise qualified," so that he could have carried out his duties with reasonable accommodations.[135]

The court also addressed whether plaintiff was judicially estopped from asserting an ADA claim, although he was receiving private disability benefits as well as worker's compensation benefits.[136] The court reasoned because such benefits were dispersed regardless of ability to perform a job with reasonable accommodations, claims for private disability benefits were not necessarily inconsistent with an ADA claim.[137] Aldrich v. Boeing Co., 146 F.3d 1265 (10th Cir. 1998).

---

[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Aldrich*, 146 F.3d at 1267.
[131] *Id.* at 1270.
[132] *Id.*
[133] *Id.*
[134] *Id.* at 1272.
[135] *Aldrich*, 146 F.3d at 1272.
[136] *Id.* at 1268.
[137] *Id.*

Inability to Work with Reasonable Accommodation No Bar to ADA Suit

The United States Court of Appeals for the Third Circuit held former employees who become disabled, and therefore, unable to work with reasonable accommodation, reserve the right to sue under Title I of the Americans With Disabilities Act (ADA) for discrimination relating to their fringe benefits.[138] The third circuit departed from holdings in the Seventh and Eleventh Circuits, thus creating a split.[139]

Plaintiff alleged discrimination in violation of the ADA due to a disparity in health benefits offered through defendant's corporate employee health plan.[140] The health plan provided for physical disability benefits until the age of sixty-five, but provided mental health benefits for only two years, unless the beneficiary was hospitalized.[141] Plaintiff sued under Title I and Title III of the ADA.[142] The initial inquiry before the court was whether a plaintiff who is disabled *and* unable to work, even with reasonable accommodation, could sue under Title I of the ADA.[143] Plaintiff acknowledged she was unable to work due to mental illness and because of this sought the denied benefits.[144] After reviewing both the legislative intent behind the ADA and earlier appellate decisions, the court held to afford disabled individuals with the full range of rights intended under the ADA, an employee must be given the right to sue for discrimination in fringe benefits, even if they are disabled and unable to work.[145] Consequently, the court held former employees who subsequently become disabled reserve the right to sue under Title I of the ADA for discrimination in their disability benefits.[146]

After affording plaintiff standing to sustain an action under Title I of the ADA, the court then reviewed whether the facts of the case supported

---

[138]Ford v. Schering-Plough Corp., 145 F.3d 601, 603 (3rd Cir. 1998), *cert. denied*, 67 U.S.L.W. 3436 (Jan. 11, 1999).

[139]*Id.* at 607.

[140]*Id.* at 603.

[141]*Id.* at 603-04.

[142]*Id.* at 604.

[143]*Ford*, 145 F.3d at 604.

[144]*Id.* at 605.

[145]*Id.* at 608.

[146]*Id.*

a finding of discrimination.[147] The court concluded because the benefits offered to plaintiff were the same benefits offered to all employees, the offer of different benefits for various disabilities was irrelevant to a claim of discrimination.[148] Consequently, the court dismissed plaintiff's claim of discrimination under Title I of the ADA.[149] Finally, the court rejected the plaintiff's argument Title III included services such as provision of mental health benefits.[150] Holding terms and conditions of employment were covered under Title I, and not Title III of the ADA, the court dismissed the claim of discrimination under Title III.[151] Accordingly, the court affirmed the dismissal of plaintiff's complaint for failure to state a claim.[152] *Ford v. Schering-Plough Corp., 145 F.3d 601(3rd Cir. 1998), cert. denied, 67 U.S.L.W. 3436, (Jan. 11, 1999).*

Disability Under ADA Includes Asymptomatic HIV

The Supreme Court of the United States broadened the definition of disability under the Americans with Disabilities Act (ADA) to include asymptomatic human immunodeficiency virus (HIV) positive individuals.[153] In doing so, the court held reproduction constitutes a major life activity such that its limitation may constitute a disability.[154] Furthermore, the court adhered to previous rulings in holding individual determinations are necessary in deciding whether the individual plaintiff was limited in a major life activity due to a disability such as asymptomatic HIV.[155]

Plaintiff was a patient of defendant dentist.[156] Plaintiff had informed defendant of her HIV positive status after being examined by defendant.[157] Plaintiff was informed she would need a filling.[158] However, defendant

---

[147]*Id.*
[148]*Ford,* 145 F.3d at 608-09.
[149]*Id.* at 614.
[150]*Id.* at 613.
[151]*Id.* at 614.
[152]*Id.*
[153]Bragdon v. Abbott, 118 S. Ct. 2196, 2207 (1998).
[154]*Id.* at 2205.
[155]*Id.* at 2207.
[156]*Id.* at 2201.
[157]*Id.*
[158]*Bragdon,* 118 S. Ct. at 2201.

refused to fill her cavity in his dental office due to plaintiff's infectious status.[159] Alternatively, defendant offered to fill plaintiff's cavity at a hospital at no extra charge for dental services.[160] Plaintiff was, however, required to pay the cost of the hospital services.[161] Instead of accepting defendant's proposal, plaintiff sued claiming discrimination in violation of the ADA.[162]

The first issue before the court was whether plaintiff was disabled under the definition of the ADA.[163] The ADA requires plaintiffs to prove disabilities that substantially limit major life activities.[164] The major life activity plaintiff relied upon to state her claim was reproduction.[165] Consequently, the Court reviewed whether reproduction could constitute a major life activity for purposes of the ADA.[166] Because the Court found reproduction was central to life itself, the court concluded reproduction could constitute a major life activity under the ADA.[167]

The next issue the court addressed was whether reproduction constituted a major life activity to plaintiff.[168] The court relied upon testimony from the plaintiff, which established she had decided not to reproduce after testing positive for HIV.[169] Additionally, expert testimony established the risks associated with reproduction, including transmitting the disease to sexual partners and to offspring.[170] The court also examined the legislative intent and previous judicial holdings construing the definition of disability under the ADA.[171] Based upon this evidence, the court concluded the inherent risks associated with HIV, even asymptomatic infection, were sufficiently severe to constitute a substantial limitation on a major life activity of plaintiff.[172]

---

[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Bragdon*, 118 S. Ct. at 2201.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.* at 2205.
[168] *Bragdon*, 118 S. Ct. at 2206.
[169] *Id.*
[170] *Id.*
[171] *Id.* at 2207.
[172] *Id.* at 2209.

Finally, the court considered the standard to be used in assessing whether an individual poses a direct threat to the health and safety of others and, therefore, is not covered under the ADA.[173] Defendant argued the court should defer to the medical judgment of health care practitioners.[174] The court held defendant's decision should be reviewed from an objective standard, evaluating the reasonableness of defendant's decision based upon the medical evidence available to him at the time of the decision.[175] The court noted the lower court had placed too much emphasis on the guidelines of the American Dental Association (ADA) and Centers for Disease Control Dentistry Guidelines (CDC).[176] The AmDA and CDC guidelines, the court explained, only recommended precautions and did not assess the level of risk.[177] The court remanded the case for a further determination of whether plaintiff posed a direct threat.[178] *Bragdon v. Abbott, 118 S. Ct. 2196 (1998).*

EMPLOYMENT PRACTICES

Reliance on Pre-1979 Service Credit Hours Not Discriminatory

The United States District Court for the Northern District of Illinois held employers did not discriminate against female employees, who took pregnancy or maternity leave before 1979, when service credit hours were used as a basis for granting pension plan enhancement programs.[179]

Plaintiff's cause of action arose from a policy by defendant's predecessor limiting service credit hours for maternity and pregnancy leave.[180] The policy was instituted prior to passage of the Pregnancy Discrimination Act (PDA) in 1979.[181] Under the policy, females taking maternity and pregnancy leave were granted a maximum of thirty days

---

[173]*Bragdon,* 118 S. Ct. at 2210.
[174]*Id.*
[175]*Id.*
[176]*Id.*
[177]*Id.* at 2211.
[178]*Bragdon,* 118 S. Ct. at 2213.
[179]Ameritech Benefit Plan Comm. v. Foster-Hall, Nos. 97 C 1441, 97 C 2209 1998 WL 419483 at *10 (N.D. Ill. July 21, 1998).
[180]*Id.* at *2.
[181]*Id.* at *1-2.

service credit.[182] Workers, who took a leave of absence related to any other type of disability, were given an unlimited number of days of service credit.[183] After the PDA became effective in 1979, defendant provided the same service credit for pregnancy related leaves of absence as other disability-related leaves of absence.[184] In several pension plan enhancement programs offered in 1993 and 1994 defendant relied on the pre-1979 service credit plan for pregnancy or maternity related leave.[185] Plaintiffs argued defendant's reliance on the pre-1979 policy violated Title VII, the Equal Pay Act, Employment Retirement Income and Securities Act (ERISA), and other state law claims because participation in the pension plans was based on an employee's number of days of service credit.[186]

The court held the statute of limitations barred the Title VII claims because defendant's current policy in determining retirement benefits did not discriminate based on gender.[187] Although the reliance on net credited service dates could place female employees who took a pregnancy leave prior to 1979 at a disadvantage, the court held the current policies did not harm plaintiffs.[188] In a Title VII claim, the court noted, the statute of limitations begins to run when the discriminatory act occurred.[189] The court rejected arguments the claim was timely because defendant's refusal to grant retroactive service credit was evidence of discriminatory intent and its reliance on the net credited service dates was a continuing violation of Title VII.[190] The court found the statute of limitations began to run when the service credit dates were applied prior to 1979.[191] Additionally, the court denied the ERISA claim because reliance by a plan administrator on a neutral seniority system placing reliance on policies implemented prior to passage of the PDA was not a breach of fiduciary duty to the plan participants.[192] The court granted defendant summary judgment.[193]

---

[182] *Id.* at *1.
[183] *Id.*
[184] *Ameritech*, 1998 WL 419483 at *1.
[185] *Id.* at *1-2.
[186] *Id.* at *2.
[187] *Id.* at *9.
[188] *Id.**3.
[189] *Ameritech*, 1998 WL 419483 at *3-4.
[190] *Id.* at *7.
[191] *Id.*
[192] *Id.* at *10.
[193] *Id.*

Ameritech Benefit Plan Commission v. Foster-Hall, Nos. 97 C 1441, 97 C 2209, 1998 WL 419483 (N.D. Ill. July 21, 1998).

EXPERT WITNESS

Speculative Expert Medical Testimony Regarding Cause Inadmissible

The United States Court of Appeals for the Fifth Circuit held speculative testimony regarding cause is inadmissible, even when offered by expert witnesses.[194]

Plaintiff truck driver sued defendant chemical company for negligent exposure to chemical vapors, which occurred when plaintiff assisted in the cleanup of a chemical spill following a delivery.[195] Plaintiff offered expert testimony from a physician, who concluded exposure to toluene during the clean-up caused plaintiff to acquire reactive airways dysfunction syndrome (RADS).[196] The court concluded the physician's causal theory lacked scientific basis and could be excluded because it lacked scientific reliability.[197] At the conclusion of the trial, the jury found plaintiff failed to establish proximate cause.[198] Plaintiff appealed.[199]

Evaluating plaintiff's claim, the court first noted the standard of review for the exclusion of expert testimony was abuse of discretion.[200] Next, the court reiterated the "relevant and reliable" standard for admissibility of expert testimony from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[201] The reliability of expert testimony, the court continued, is weighed by balancing:

(1) whether the expert's theory can be tested;
(2) whether the theory has been subject to peer review and publication;

---

[194]Moore v. Ashland Chem., Inc., 151 F.3d 269, 279 (5th Cir. 1998) (en banc).
[195]*Id.* at 271-272.
[196]*Id.* at 273.
[197]*Id.* (citing Daubert v. Merrell Dow Pharm., Inc. 509 U.S. 579 (1993); FED. R. EVID. 702).
[198]*Id.* at 272.
[199]*Moore,* 151 F.3d at 272.
[200]*Id.* at 274 (citing General Elec. Co. v. Joiner, 118 S. Ct. 512 (1997)).
[201]*Id.* at 275.

(3) the potential rate of error existence of standards and controls; and
(4) general acceptance by the scientific community.[202]

Finally, the court individually analyzed the assertions allegedly supporting the expert physician's theory.[203] First, the physician's training, expertise, examinations, and tests were inadmissible because the physician did not establish those items aided him in determining causation.[204] Second, the court held the conclusions of an article relied upon by the physician were speculative.[205] Third, the material safety data sheet for the spilled chemicals had limited value, because the expert was unaware of the tests conducted in generating the data contained on the sheet.[206] Fourth, the temporal connection between exposure and injury was not substantiated.[207] Finally, the expert's theory that any irritant could cause RADS lacked scientific support.[208]

Ultimately, the court found none of the *Daubert* factors used to assess whether an opinion is based on sound scientific methodology was met.[209] The expert's theory had not been tested, was not subject to peer review, the rate of error was not known, nor had the theory attained general acceptance.[210] Thus, the district court did not abuse its discretion in finding that the analytical gap between the expert's causal theory and scientific knowledge supporting that theory was too wide.[211] Accordingly, the court upheld the judgment of the district court.[212] *Moore v. Ashland Chemical, Inc., 151 F.3d 269 (5th Cir. 1998) (en banc).*

---

[202] *Id.* (citing *Daubert*, 509 U.S. at 593-95).
[203] *Id.* at 277-279.
[204] *Moore*, 151 F.3d at 278.
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.* at 279.
[209] *Moore*, 151 F.3d at 279.
[210] *Id.*
[211] *Id.*
[212] *Id.*

Expert Medical Testimony on Generally Accepted Mental Disorder Admissible

The Court of Appeals of Washington, Division One, held testimony pertaining to disassociative identity disorder (DID) was admissible because it passed the general acceptance test of *Frye v. United States*.[213]

Defendant had been convicted multiple times for crimes ranging from burglary to sodomy.[214] After his last conviction, defendant participated in a sex offender treatment program, where he was diagnosed with DID.[215] Individuals with DID, the court noted, possess a primary identity and a number of alternate identities existing in a co-conscious state.[216] Following release from the treatment program, defendant continued a voluntary course of therapy.[217] After defendant's condition began deteriorating, his therapist visited him at home to determine if he needed hospitalization.[218] Incidents arising from that visit led to charges of indecent liberties and kidnapping following an attack on the therapist.[219]

In light of his DID diagnosis, defendant asserted insanity and diminished capacity defenses for each charge.[220] After hearing expert testimony from both the state and defendant, the trial court excluded testimony relevant to DID on the grounds it was not generally accepted and the court ruled it would not be helpful to the jury.[221] Admissible expert testimony, the court ruled, must satisfy both the *Frye* general acceptance test and Federal Rule of Evidence (FRE) 702.[222] The court held the trial court erroneously excluded DID testimony by merging the two inquiries in holding DID failed to satisfy *Frye* because research did not indicate whether an individual with DID was insane.[223] Thus, the trial

---

[213]State v. Greene, 960 P.2d 980, 989-90 (Wash. Ct. App. 1998) (citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).

[214]*Id.* at 985.

[215]*Id.*

[216]*Id.* at 982-83.

[217]*Id.* at 985.

[218]*Greene*, 960 P.2d at 985.

[219]*Id.*

[220]*Id.*

[221]*Id.* at 986.

[222]*Id.* at 988.

[223]*Greene*, 960 P.2d at 988.

court misapplied the *Frye* test.[224] The court held the relationship between DID and insanity was appropriately analyzed under a FRE 702 inquiry.[225] However, the question of DID's general acceptance was a separate issue.[226]

On further review, the court first noted DID is a generally accepted mental disorder.[227] Analyzing FRE 702, the court considered whether DID was relevant to the legal defenses of insanity and diminished capacity.[228] The court held evidence of DID was relevant to an insanity defense for indecent liberties because testimony of the therapist/victim tended to show defendant was legally insane.[229] Without expert testimony the jury was unable to determine the extent to which DID affected defendant's sanity.[230] However, the court found DID was not relevant to kidnapping because activity of defendant during the attack did not amount to legal insanity.[231] Next, the court determined DID testimony was relevant to the diminished capacity defense for both charges because such testimony could show defendant was unable to form the requisite *mens rea*.[232] Finally, the court found because defendant did not exhibit signs of malingering or faking DID, testimony regarding DID would be reliable and helpful to the jury.[233] Accordingly, the court reversed and remanded.[234] *Washington v. Greene, 960 P.2d 980 (Wash. Ct. App. 1998).*

---

[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.* at 990.
[228] *Greene,* 960 P.2d at 990.
[229] *Id.* at 991-93.
[230] *Id.* at 992.
[231] *Id.* at 993.
[232] *Id.* at 993-94.
[233] *Greene,* 960 P.2d at 996-97.
[234] *Id.* at 997.

FEDERAL DRUG ADMINISTRATION

FDA Lacks Jurisdiction to Regulate Tobacco Sales and Limit Advertising

The United States Court of Appeals for the Fourth Circuit held the Food, Drug, and Cosmetic Act (Act) did not grant the Food and Drug Administration (FDA) the jurisdiction to regulate tobacco products.[235]

The FDA enacted a final rule "restricting the sale and distribution of tobacco products to minors and limiting the advertising and promotion of tobacco products."[236] Cigarette and smokeless tobacco manufacturers, convenience store retailers, and advertisers challenged the FDA's jurisdiction over tobacco products.[237] The FDA claimed jurisdiction under both the drug and device provisions of the Act.[238] Tobacco products were classified as "combination products" because they contained both the drug nicotine, and the device that delivered nicotine to the body.[239] At the FDA's discretion, tobacco products were ultimately regulated as devices.[240] The district court upheld the statutory authority of the FDA to regulate tobacco products as devices, but revoked the restrictions on advertising.[241]

On appeal, the court considered whether Congress intended to delegate the jurisdiction to regulate tobacco to the FDA.[242] First, the court noted the FDA's claim of jurisdiction was based only on the literal meaning of the definitions of drug and device in the Act.[243] Examining the definitions in light of the whole Act, the court held the FDA had jurisdiction to regulate the sale, distribution, and use of products, to assure a reasonable degree of safety.[244] However, based on the FDA's own findings that tobacco products were unsafe, the court reasoned "it is

---

[235]Brown & Williamson Tobacco Corp. v. Food & Drug Admin., 153 F.3d 155, 176 (4th Cir. 1998).

[236]*Id.* at 159. (*See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44, 396 (1996)).

[237]*Id.*

[238]*Id.*

[239]*Id.* at 160.

[240]*Brown*, 153 F.3d at 160.

[241]*Id.* at 159.

[242]*Id.* at 161-62.

[243]*Id.* at 163.

[244]*Id.* at 164.

impossible to create regulations which will provide a reasonable assurance of safety."[245] Thus, the FDA could not comply with the statutory authority for the regulation of tobacco products, it cited in its own argument.[246] The court found the FDA's need to maneuver around the obstacle created by the operative provision of the Act reflected congressional intent to exclude tobacco products from the scope of the FDA's authority.[247]

Furthermore, the court noted the FDA consistently disclaimed jurisdiction of tobacco products under the Act.[248] Twice, the court noted, public health groups petitioned the FDA to regulate cigarettes, and under both the drug and device provisions, the FDA concluded it lacked jurisdiction.[249] Finally, the court reviewed numerous federal statutes and amendments regulating tobacco products and found that "Congress had taken no steps to overturn the FDA's interpretation of the Act, and had no jurisdiction over tobacco products."[250] The Court concluded the authority to regulate tobacco products was found to rest in Congress's regulatory scheme, not in the FDA.[251] Thus, the court reversed the district court's grant of summary judgment.[252] *Brown & Williamson Tobacco Corp. v. Food & Drug Admin., 153 F.3d. 155 (4th Cir. 1998).*

Marketing Drug Not Fraudulent Misrepresentation Drug FDA Approved

The United States District Court for the District of New Jersey held the mere act of placing a drug on the market with standard package inserts similar to those used for Food and Drug Administration (FDA) approved drugs did not rise to fraudulent misrepresentation the drug had FDA approval.[253] The court also concluded such action failed a Rule 12(b)(6) motion under theories predicated in the Lanham Act,[254] of common law

---

[245]*Brown,* 153 F.3d at 163-64.
[246]*Id.*
[247]*Id.* at 167.
[248]*Id.* at 168-70.
[249]*Id.*
[250]*Brown,* 153 P.2d at 170-75 *passim.*
[251]*Id.* at 175-76.
[252]*Id.*
[253]Eli Lilly & Co. v. Roussel Corp., 23 F. Supp. 2d 460, 478 (D.N.J. 1998).
[254]*See* 15 U.S.C. § 1126(b), (h) and/or (i).

fraud, negligent misrepresentation, and tortious interference with business relationships.[255]

Plaintiff Lilly filed an action against pharmaceutical companies Opos and Roussel alleging defendants fraudulently obtained FDA approval for a generic version of Lilly's antibiotic Ceclor.[256] In 1992, Opos sought FDA approval by submitting the required Abbreviated Antibiotic Drug Application (AADA) to the FDA.[257] From 1995 through 1996, Opos and Roussel sold the active ingredient in Lilly's antibiotic throughout the United States until the FDA initiated an investigation of defendant's AADA precipitated by complaints about the drug.[258] The FDA detected numerous inconsistencies in defendant's AADA, among them a failure to manufacture the drug according to the process represented in the AADA.[259] Opos and Roussel recalled the drug stating there were "inconsistencies" in its submission to the FDA.[260] The FDA declared the AADA contents false and misleading.[261]

Asserting defendants' marketing of the drug constituted an implied statement defendants lawfully obtained FDA approval,[262] Lilly commenced an action pursuant to the Lanham Act,[263] which "creates a cause of action for any false description of a product"[264] [and] "for unfair competition."[265] The Third Circuit held the complaint fatally defective because the complaint failed to show any statement or representation by the defendants the drug actually had FDA approval.[266] Quoting the Fourth Circuit's decision in *Mylan Laboratories v. Matkari,* the Third Circuit held the defect could not be cured by contending the "very act of placing a drug on the market with standard package inserts often used for FDA-approved drugs, somehow implies (falsely) that the drug had been

---

[255]*Eli Lilly,* 23 F. Supp. 2d at 478-79, 481.
[256]*Id.* at 466-67.
[257]*Id.* at 468
[258]*Id.*
[259]*Id.*
[260]*Eli Lilly,* 23 F. Supp. 2d at 468.
[261]*Id.*
[262]*Id.* at 469.
[263]*See* 15 U.S.C. § 1126(b), (h) and/or (i).
[264]*Eli Lilly,* 23 F. Supp. at 475 (quoting U.S. Healthcare v. Blue Cross of Greater Philadelphia, 898 F.2d 94, 921 (3rd Cir. 1990)).
[265]*Id.* (quoting A.T. & T. v. Winback & Conserve Program, 42 F.3d 1421, 1428 (3rd Cir. 1994)).
[266]*Id.* at 476-77.

properly approved by the FDA."[267] The court bolstered its reasoning by citing the United States District Court for the Eastern District of New York, which adopted the reasoning of *Mylan* in *Barr Laboratories, v. Quantum Pharmics.*[268] In *Barr*, the court reasoned package descriptions such as "generic," "bioequivalent," and "dependable alternative" to plaintiff's FDA-approved product, did not constitute false and misleading implications a drug had FDA approval.[269] Relying on *Mylan*, the court dismissed the claim.[270] Likewise, the Third Circuit dismissed claims of unfair competition relying on Third Circuit precedent, which held the Lanham Act did not create a right of action of one American citizen against another regarding unfair competition.[271] Accordingly, no such right of action should exist between an American and a foreign corporation.[272] The remaining counts of the complaint were dismissed under Federal Rule of Civil Procedure 12(b)(6).[273] *Eli Lilly & Co. v. Roussel Corp., 23 F. Supp. 2d 460 (D.N.J. 1998).*

HEALTH MAINTENANCE ORGANIZATIONS

False Advertising Insufficiently Related to Medical Services

The United States Court of Appeals for the Fifth Circuit held a surgeon's claim of false advertising against a health maintenance organization (HMO) did not relate sufficiently to medical services to require arbitration as provided for in physician's contract with the HMO.[274]

Plaintiff, an orthopedic surgeon, had a contract with defendant HMO, to provide medical services for HMO beneficiaries.[275] The contract contained a clause requiring arbitration for any claim arising out of or

---

[267] *Id.* at 477 (quoting Mylan Labs, Inc. v. Matkari, 7 F.3d 1130 (4th Cir. 1993)).
[268] *Id.* at 478 (citing Barr Lab, Inc. v. Quantum Pharmics, Inc., No. 90 Civ. 4406, 1994 U.S. Dist. LEXIS 2197 (E.D.N.Y. Feb. 2, 1994)).
[269] *Lilly,* 23 F. Supp. 2d at 478.
[270] *Id.* at 485.
[271] *Id.* at 491.
[272] *Id.*
[273] *Id.* at 497.
[274] Ford v. NYL Care Health Plans of the Gulf Coast, 141 F.3d 243, 245 (5th Cir. 1998).
[275] *Id.* at 245.

relating to the contract for medical services.[276] Because plaintiff had become dissatisfied with defendant's advertising, he instituted an action for false advertising.[277] Defendants claimed the mandatory arbitration clause in the parties' contract barred the action.[278] The court held Texas arbitration law governed the action.[279] Next, the court announced the standard used in an arbitration determination in Texas required a review of the factual allegations in the claim, not a review of the causes of action involved.[280] According to Texas law, a claim such as the one at issue may fall outside the scope of the arbitration clause if the action could independently be maintained without any reference to the contract itself.[281] Because the action depended upon the manner in which the defendant advertised its services, the court concluded all the elements necessary to sustain an action for false advertising in this case could be proven without any reference to the contract between the HMO and plaintiff.[282] Consequently, the court found the false advertising claim fell outside the scope of the arbitration clause and affirmed the judgment of the lower court.[283] *Ford v. NYL Care Health Plans of the Gulf Coast., 141 F.3d 243 (5th Cir. 1998).*

HMO Contract Frustrated by Abolition of DRGs

The United States District Court for the District of New Jersey held a hospital services contract frustrated due to the abolition of governmental hospital billing system (DRG) rates and, accordingly, ordered modification of the parties' agreement to reflect the original pricing formula.[284]

In 1991, plaintiff hospital entered into a "Hospital Services Agreement" with defendants U.S. Healthcare and the Health Maintenance

---

[276] *Id.* at 246.
[277] *Id.*
[278] *Id.* at 247.
[279] *Ford,* 141 F. 3d. at 250.
[280] *Id.*
[281] *Id.*
[282] *Id.* at 251.
[283] *Id.* at 252.
[284] Unihealth v. U.S. Healthcare, Inc., 14 F. Supp. 2d 623, 637 (D.N.J., 1998).

Organization of New Jersey.[285] As part of the agreement, plaintiff was to provide healthcare services to enrollees in defendant's HMO program in exchange for payment.[286] The agreement provided a discounted fee payment schedule, which included a designation of prices that could be charged for given services.[287] Additionally, defendant agreed to reimburse plaintiff, if the overall discount for services exceeded forty percent.[288] Plaintiff sued to recover payment, as well as prejudgment interest, for the services it provided under the agreement.[289]

At the time the parties entered into their agreement a regulatory billing system (DRG) applied to hospitals throughout New Jersey.[290] The DRG provided a flat fee that could be charged for different classes of inpatient healthcare procedures.[291] In 1993, the New Jersey legislature abolished the DRG system.[292] After the DRG regulation was abolished, hospitals were free to determine charge rates for their services.[293]

According to defendant, plaintiff's fees increased 65 percent after the abolition of the DRG.[294] Defendant contended its failure to pay plaintiff was justified by its frustrated expectation of receiving the discounts the DRG system had provided.[295]

The court held the parties originally intended to base the discounted rates under the requirements of the DRG.[296] The court continued, because neither party had contemplated the abolition of the DRG, the change left the parties unable to fulfill their respective terms of the agreement.[297] Consequently, the court ordered the parties to base the discounted rates on the former DRG system, so the agreement would reflect the parties' original contractual expectations.[298] Accordingly, the court ordered defendant to pay plaintiff $33,088.32 for its 1992 services, plus $6,286.22

---

[285] *Id.* at 626.
[286] *Id.*
[287] *Id.*
[288] *Id.* at 627.
[289] *Unihealth,* 14 F. Supp. 2d at 623.
[290] *Id.* at 627-28.
[291] *Id.* at 628.
[292] *Id.*
[293] *Id.* at 628.
[294] *Unihealth,* 14 F. Supp. 2d at 643.
[295] *Id.*
[296] *Id.*
[297] *Id.*
[298] *Id.* at 642.

prejudgment interest.[299] *Unihealth v. United States Healthcare, Inc., 14 F. Supp. 2d 623 (D.N.J. 1998).*

INFORMED CONSENT

Community Standard No Longer Test in Negligence Actions

The Supreme Court of Rhode Island held the same or similar community standard is no longer the test for determining the standard of care in negligence actions in Rhode Island.[300] The court adopted a test inquiring whether a defendant physician used the same degree of care and skill expected from a reasonably competent physician acting under the same circumstances and belonging to the same class to which the defendant physician belongs.[301] Next, the court held when material risks and viable alternatives are not offered during pre-surgical counseling, there is *per se* a lack of informed consent.[302] The court also held Rhode Island law did not limit the types or amount of damages recoverable in a negligence action, except for those damages proximately caused by defendant's negligence and reasonably foreseeable at the time of the alleged negligence.[303] Finally, the court upheld the lower court's dismissal for the claim of negligent infliction of emotional distress due to lack of evidence.[304]

Plaintiffs were the mother and father of an eleven-month-old child, who underwent surgery for the removal of a tumor in her neck.[305] The surgery, which was performed by defendant, a pediatric surgeon, was later found to have severed a nerve.[306] The severed nerve led to a variety of neurological problems.[307] Subsequently, another pediatric surgeon successfully reconnected the nerve and the child recovered fully.[308]

---

[299] *Unihealth*, 14 F. Supp. 2d at 643.
[300] Flanagan v. Wesselhoeft, 712 A.2d 365, 368-69 (R.I. 1998).
[301] *Id.* at 368.
[302] *Id.* at 371.
[303] *Id.*
[304] *Id.* at 372.
[305] *Flanagan*, 712 A.2d at 366.
[306] *Id.*
[307] *Id.* at 367.
[308] *Id.*

Plaintiffs alleged negligence due to the severing of the nerve and lack of informed consent.[309] The parties stipulated, prior to the surgery, defendant discussed no alternatives to surgery with plaintiffs.[310] The only material risks of the surgery discussed were infection and bleeding.[311] At trial, plaintiffs attempted to use an out-of-state pediatric surgeon as an expert witness to testify to the standard of care required.[312] However, the lower court disallowed the expert's testimony because the expert lacked sufficient knowledge regarding the standard of care required from a pediatric surgeon practicing in Rhode Island.[313] On appeal, the Supreme Court of Rhode Island reversed, holding the correct standard of care to be the care a reasonable practitioner in the same place as the defendant and under the same circumstances would offer.[314] Consequently, the court found plaintiff's expert had incorrectly been barred.[315]

Next, the court considered the issue of informed consent. The lower court granted summary judgment to defendants on the issue of informed consent because the court believed plaintiffs' evidence could not convince a reasonable jury plaintiffs would have chosen not to have the surgery if they had known all the material risks.[316] The Supreme Court of Rhode Island reversed, holding the reason for an informed consent right of action was to allow individuals to make informed medical decisions based upon all potentially relevant facts.[317] Therefore, the court held informed consent did not exist, if viable alternatives and material risks are not disclosed to the patient.[318] Finally, the court held Rhode Island law allows for all types of damages in negligence claims.[319] Only damages not proximately caused by defendants or not reasonably foreseeable at the time of the negligence may be limited.[320] Accordingly, the judgment by the lower

---

[309] *Id.* at 366.
[310] *Flanagan*, 712 A.2d at 366.
[311] *Id.*
[312] *Id.* at 367.
[313] *Id.* at 368.
[314] *Id.* at 369.
[315] *Flanagan*, 712 A.2d at 369.
[316] *Id.*
[317] *Id.* at 371.
[318] *Id.*
[319] *Id.*
[320] *Flanagan*, 712 A.2d at 371.

court was vacated and the case was remanded for a new trial.[321] *Flanagan v. Wesselhoeft, 712 A.2d 365 (R.I. 1998).*

INSURANCE

Insured Employee Required to File Claim Under ERISA

The United States District Court for the Southern District of Florida held plaintiffs insured under group insurance policies could not seek protection under a Florida statute because their claims were preempted by the Employee Retirement Income Security Act (ERISA).[322]

From 1991 plaintiff was covered by his employees' group insurance policy, which provided major medical coverage.[323] In 1996, the insured became infected with the human immunodeficiency virus (HIV).[324] In 1997, defendant insurance company terminated plaintiff's coverage.[325] Plaintiff sued under a state statute, which prohibited insurers from canceling the health insurance policies of insurees because of a diagnosis of or treatment for acquired immune deficiency syndrome (AIDS).[326] Defendant moved to remove the action to federal court on the basis ERISA covered plaintiff's benefit plan.[327] Defendant also moved for dismissal because, defendant argued, ERISA preempted the plaintiff's common law claim.[328]

In considering whether ERISA preempted plaintiff's state claim, the court relied on the language of section 514(a) of ERISA, which explicitly provided all state laws relating to any employee benefit plan were preempted by ERISA.[329] The second issue before the court was whether the state claim could be removed to federal court when Congress had completely preempted state causes of action regarding benefits governed

[321] *Id.* at 372.
[322] Parra v. John Alden Ins. Co., 22 F. Supp. 2d 1360, 1362 (S.D. Fla. 1998).
[323] *Id.* at 1361.
[324] *Id.*
[325] *Id.*
[326] *Id.*
[327] *Parra*, 22 F. Supp. 2d at 1361.
[328] *Id.* at 1361-62.
[329] *Id.* at 1363.

by an ERISA plan.[330] The court held all cases seeking recovery of benefits under an ERISA plan had to be converted into federal claims and removed to federal court.[331] All civil complaints raising ERISA issues were therefore, federal in character and had to be removed.[332] The third issue was whether the state claim escaped preemption by virtue of the ERISA savings clause.[333] The "savings clause" provided nothing in ERISA should preempt any state law regulating insurance, banking, or securities.[334] The court ruled plaintiff could not seek protection under ERISA's saving clause because plaintiff's claim was subject to complete preemption under the civil enforcement provision of section 502(a) of ERISA, even though this allowed insurance companies to use ERISA as a shield to deny employees remedies they otherwise would have.[335] Accordingly, the case was dismissed.[336] *Parra v. John Alden Life Ins. Co., No. 98-0436-CIV-KING, 1998 U.S. Dist. LEXIS 12875 (S.D. Fla. June 30, 1998).*

Administrator Abused Discretion in Denying Insurance Coverage Under ERISA

The United States Court of Appeals for the Fifth Circuit denied defendant's summary judgment motion because defendant abused its discretion in denying plaintiff's claim for surgery and in rescinding her medical coverage under the Employee Retirement Income Security Act (ERISA).[337]

In 1995 plaintiff applied for coverage for himself and his wife in an employer-sponsored group medical plan underwritten by defendant.[338] Plaintiff's spouse underwent surgery in 1995.[339] Defendant, through one of its subsidiaries, denied coverage because of spouse's pre-existing

---

[330] *Id.*.
[331] *Id.*
[332] *Parra*, 22 F. Supp. 2d at 1363-64.
[333] *Id.* at 1364.
[334] *Id.*
[335] *Id.* at 1364-65.
[336] *Id.* at 1365.
[337] Vega v. Nat'l Life Ins. Serv. Inc., 145 F.3d 673, 681 (5th Cir. 1998).
[338] *Id.* at 675.
[339] *Id.*

medical condition and rescinded all her coverage.[340] Plaintiff sued in state court, but defendant removed to federal court.[341] The district court granted summary judgment in favor of defendant after concluding ERISA applied and defendant had not abused its discretion in denying the medical claim.[342]

The court found ERISA applied to the cause of action because the express language in ERISA encompassed employee welfare benefit plans provided through the purchase of insurance.[343] In addition, the court noted an ERISA plan existed, if from the surrounding circumstances a reasonable person could ascertain the intended benefits, a class of beneficiaries, the source of the financing, and the procedure for receiving benefits.[344] The court held the abuse of discretion standard was the appropriate standard of review for the summary judgment motion because defendant was the administrator and therefore had discretion for payment of claims.[345] This, the court noted, created a conflict of interest because defendant was the administrator of the plan and had complete authority to decide questions of coverage.[346]

The court held it was not limited only to the evidence available to the plan administrator in evaluating whether the administrator abused its discretion in denying plaintiff coverage.[347] When an administrator has acted under an inherent conflict of interest, the court concluded it had a duty to conduct a full and fair review of all pertinent information reasonably available to the administrator.[348] A reasonable inquiry, in this case, showed plaintiff did not have a pre-existing condition justifying denial of coverage.[349] Accordingly, the court reversed the grant of summary judgment.[350] *Vega v. National Life Ins. Servs., Inc.*, 145 F.3d 673 (5th Cir. 1998).

---

[340] *Id.*
[341] *Id.*
[342] *Vega*, 145 F.3d at 675.
[343] *Id.* at 676
[344] *Id.*
[345] *Id.* at 677.
[346] *Id.* at 677-78.
[347] *Vega*, 145 F.3d at 680.
[348] *Id.*
[349] *Id.*
[350] *Id.* at 681.

Emotional Injuries Not Covered by Underinsured Motorist Policy

The Supreme Court of Washington held underinsured motorist policies did not provide coverage for emotional injuries unrelated to physical injuries arising from the same incidents.[351]

While assisting a motorist in January 1990, plaintiff, a sheriff's deputy, and a state trooper were hit by an automobile.[352] The state trooper later died as a result of injuries sustained in the accident.[353] Plaintiff suffered minor physical injuries, but was diagnosed a year later with depression and post-traumatic stress disorder as a result of the accident.[354] On appeal, plaintiff successfully argued his emotional injuries were covered under the underinsured motorist policy (UIM) because they resulted from the same incident in which he suffered physical injuries.[355] The Washington State Legislature, the court noted, mandated UIM coverage for insured motorists, but limited the coverage required to damages for bodily injury.[356] The court granted summary judgment for plaintiff, but the Supreme Court of Washington granted defendant's request for an appeal.[357]

The court found the terms of the policy were unambiguous and only provided coverage for bodily injuries.[358] The court's interpretation of the policy, it noted, was in accord with a majority of jurisdictions, which also held bodily injury did not include damages for emotional injuries.[359] In addition, the court found similar limitations placed on UIM coverage were not contrary to public policy.[360] Specifically, the court held denying coverage for purely emotional injuries was not contrary to public policy because allowing recovery for emotional injuries was not contrary to public policy because allowing recovery for emotional injuries would

[351]Daley v. Allstate Ins. Co., 958 P.2d 990, 998 (Wash. 1998) (en banc).
[352]*Id.* at 991.
[353]*Id.*
[354]*Id.*
[355]*Id.* at 992.
[356]*Daley*, 958 P.2d at 992.
[357]*Id.*
[358]*Id.* at 993-94.
[359]*Id.* at 994.
[360]*Id.* at 996-97.

interfere with insurance companies' right to contract and because the Washington legislature permitted UIM policies limited to bodily injuries.[361] The court, therefore, reversed the decision of the court of appeals.[362] *Daley v. Allstate Ins. Co., 958 P.2d 990 (Wash. 1998) (en banc).*

Recission of Insurance Policy After Misrepresentations Improper

The United States Court of Appeals for the Ninth Circuit held recission of insurance policies in which misrepresentations had been made by insurees were improper when policies had the ability to be altered.[363] Ordinarily, the court noted, the Employee Retirement Income Security Act (ERISA) allowed insurance companies to rescind policies in which misrepresentations had been made by insurees.[364]

In 1993, defendant, a co-owner and employee of HKM Machine & Fabrication, purchased an insurance plan from plaintiff, Security Life Insurance.[365] As an employee, defendant was required to fill out an insurance application containing his medical history.[366] Defendant received a discounted premium as a result of his representations of good health.[367] Defendant's policy did not contain any termination or recission provisions.[368] However, under the policy the premium could be altered in order to reflect any changes in the insuree's actual condition, and therefore, the insuree would ultimately pay the correct premium.[369]

After issuing the policy, plaintiff allowed defendant to review his policy and to correct any misrepresentations.[370] Defendant was warned his failure to correct the application could result in the recission of the policy agreement.[371] The defendant failed to disclose any misrepresentations he

---

[361] *Daley*, 958 P.2d at 996-97.
[362] *Id.* at 998.
[363] Security Life Ins. Comp. of Am. v. Meyling, 146 F.3d 1184, 1193 (9th Cir. 1998).
[364] *Id.* at 1188.
[365] *Id.* at 1186.
[366] *Id.*
[367] *Id.*
[368] *Security Life*, 146 F.3d at 1186.
[369] *Id.*
[370] *Id.* at 1187.
[371] *Id.*

made in the first application.[372] In 1994, defendant suffered a cardiac aneurysm, which led to a hospital stay of over three months and $670,000 in medical expenses.[373] Plaintiff refused to pay defendant's claim after discovering defendant had misrepresented his medical history in his application.[374] Plaintiff sued for the recission of the policy agreement. Defendant, in turn, filed a counterclaim for breach of contract and bad faith, as well as a claim under ERISA.[375]

The court held ERISA preempted the California Insurance Code.[376] Additionally, the court held, although ERISA did not permit recission as a remedy when misrepresentations were made in insurance contracts, the court held recission improper in the instant case.[377] The court reasoned, because the policy contained a compensation mechanism in order to adjust the premium to the correct amount, plaintiff was provided an adequate remedy as a result of the bargain with defendant.[378] Thus, the court reversed the district court's decision in favor of plaintiff.[379] *Security Life Ins. Co. of Am. v. Meyling, 146 F.3d 1184 (9th Cir. 1998).*

Insurance Companies Differentiation Between Disability Types Does Not Violate ADA

The United States Court of Appeals for the Sixth Circuit held the Americans with Disabilities Act (ADA) does not prohibit insurance companies from differentiating between disability types.[380] Plaintiff was a schoolteacher employed by defendant, Fayette County Board of Education (FCBE).[381] During each year of her employment, plaintiff was allowed to select one of several health plans for her medical coverage.[382] In 1993, plaintiff selected plan of defendant, Healthwise of Kentucky.[383]

---

[372] *Id.*
[373] *Security Life*, 146 F.3d. at 1187.
[374] *Id.*
[375] *Id.*
[376] *Id.* at 1188.
[377] *Id.* at 1189.
[378] *Security Life*, 146 F.3d at 1192.
[379] *Id.* at 1193.
[380] *Lenox v. Healthwise of Ky., Ltd.*, 149 F.3d 453, 457 (6th Cir. 1998).
[381] *Id.* at 454.
[382] *Id.*
[383] *Id.*

Under the terms of plaintiff's health plan, organ transplants other than bone marrow, kidney, liver, and cornea were excluded from coverage.[384]

Shortly after the plan took effect, plaintiff became pregnant.[385] During the course of her pregnancy, plaintiff developed a heart condition, which continued to worsen after the birth of her child.[386] Plaintiff's condition eventually led to a stroke, which forced plaintiff to retire from her employment with the FCBE.[387] As a recent retiree, plaintiff renewed her coverage with defendant.[388] The new plan included a similar provision, which excluded heart transplants from coverage.[389] On March 4, 1994, plaintiff suffered heart failure, requiring her to undergo heart transplant surgery.[390] Defendant refused plaintiff's appeal for denial of coverage for costs relating to the transplant surgery.[391]

In September 1994, plaintiff sued alleging violation of the ADA by defendant in issuing a policy containing a discriminatory, disability-based distinction.[392] The suit also alleged that the FCBE violated the ADA by participating in a coverage plan that subjected plaintiff to disability-based discrimination.[393] The court held plaintiff's claim untenable, finding the ADA did not prohibit insurance companies from differentiating between different disabilities because insurance companies were not public accommodations as defined by the ADA.[394] The court interpreted a public accommodation to be a physical place.[395] The court continued there must be a barrier to physical access to trigger the type of ADA violations of which plaintiff complained.[396] Therefore, the court affirmed the lower court's grant of summary judgment in favor of defendant.[397] *Lenox v. Healthwise of Kentucky, Ltd., 149 F.3d 453 (6th Cir. 1998).*

---

[384] *Id.*
[385] *Lenox*, 149 F.3d at 454.
[386] *Id.*
[387] *Id.*
[388] *Id.*
[389] *Id.* at 454-55.
[390] *Lenox*, 149 F.3d at 455.
[391] *Id.*
[392] *Id.*
[393] *Id.*
[394] *Id.* at 457.
[395] *Lenox*, 149 F.3d at 456.
[396] *Id.* at 457.
[397] *Id.*

LABOR RELATIONS

Use of Medical Records as Evidence of Age Discrimination Prejudicial

The United States Court of Appeals for the Eleventh Circuit held a trial court erred by allowing the jury to consider medical evidence as evidence of age discrimination under the Age Discrimination in Employment Act (ADEA).[398]

Plaintiff was an employee of defendant, Florida Power Company, for eleven years prior to termination.[399] As a result of his termination, plaintiff sued alleging a violation of the ADEA and a denial of company medical benefits in violation of Employment Retire Income Security Act (ERISA).[400] Plaintiff further alleged he was terminated in retaliation for making claims for company medical benefits.[401]

During the trial, defendant moved to prevent plaintiff from presenting to the jury evidence regarding medical insurance issues.[402] The district court granted defendant's motion to prevent the jury from considering the ERISA claim.[403] However, during closing arguments, plaintiff's counsel mentioned plaintiff's claim for medical benefits and implied the claims may have influenced plaintiff's termination because it made him a more expensive employee.[404] The district court instructed the jury it might consider insurance claims as evidence of age discrimination.[405] After a verdict for plaintiff, defendant moved for a new trial, citing the jury's consideration of ERISA-related medical evidence as a source of prejudice.[406]

The court elucidated the distinctions between plaintiff's claims under the ADEA and ERISA.[407] The court stated the ADEA did not prohibit an employer from considering the higher cost of an employee as a result of

---

[398] *Broaddus v. Florida Power Corp.*, 145 F.3d 1283, 1288 (11th Cir. 1998).
[399] *Id.* at 1285.
[400] *Id.*
[401] *Id.*
[402] *Id.*
[403] *Broaddus,* 145 F.3d at 1285.
[404] *Id.* at 1286.
[405] *Id.*
[406] *Id.*
[407] *Id.* at 1287.

medical benefit claims as a reason for termination.[408] The court continued although ERISA might prohibit such consideration, the jury was not entitled to consider medical benefit claims as evidence of discrimination.[409] For this reason, the court held the jury's consideration of medical evidence was prejudicial to the defense and, therefore reversed and remanded.[410] *Broaddus v. Florida Power Corp., 145 F.3d 1283 (11th Cir. 1998).*

MALPRACTICE

Negligent Spoilation of Evidence Not Recognized Tort Claim

The Superior Court of New Jersey, Appellate Division, held the tort claim of negligent spoiliation of evidence did not exist.[411]

On February 14, 1992, plaintiff-patient underwent mammography at Chilton Memorial Hospital Mobile Unit (Chilton). Subsequently, several physicians, including defendant physician Dr. Kalisher, read the mammogram films.[412] On April 22, 1992, defendant concluded no evidence of a malignancy existed.[413] On July 28, 1993, plaintiff underwent another mammography at Overlook Hospital.[414] On August 2, 1993, defendant physician, Dr. Fletcher (one of the physicians who reviewed plaintiff's February mammogram films) indicated to plaintiff's personal physician the results were inconclusive.[415] In September 1993, plaintiff underwent a third mammography, which showed a tumor.[416] Plaintiff's physician speculated the size of the tumor indicated its probable existence in February 1992; however, because the earlier mamograms were no longer available for comparison, the determination of whether the

[408] *Broaddus*, 145 F.3d at 1287.
[409] *Id.*
[410] *Id.* at 1288.
[411] Proske v. St. Barnabas Med. Ctr., 712 A.2d 1207, 1211 (N.J. Super. Ct. App. Div. 1998).
[412] *Id.* at 1208.
[413] *Id.* at 1209.
[414] *Id.*
[415] *Id.* at 1209.
[416] *Proske*, 712 A.2d at 1209.

tumor existed in February 1992 could not be made with reasonable medical certainty.[417]

The issue before the court was whether plaintiffs could assert a claim of negligent spoilation of evidence despite the absence of any statutes granting a cause of action for negligent spoilation of evidence.[418] The court found no cause of action existed for negligent spoilation of evidence. However, the court noted a tort for destruction of evidence did exist.[419] The court found five elements needed to be satisfied for a claim of destruction of evidence.[420] First, there had to be pending or probable litigation involving plaintiff.[421] Second, defendant had to have knowledge a cause of action existed or was probable.[422] Third, defendant, willfully and possibly negligently, had to destroy evidence with the purpose of disrupting plaintiff's case.[423] Fourth, plaintiff's case had to be disrupted by destruction of the evidence.[424] Fifth, damage to plaintiff had to be related proximately to defendant's destructive acts.[425]

The court concluded plaintiff failed to satisfy the first two elements.[426] The court concluded by reiterating state law had not granted a cause of action for negligent spoilation of evidence.[427] Therefore, the court could recognize no such claim.[428] Accordingly, the court affirmed the grant of summary judgment for defendants.[429] *Proske v. St. Barnabas Med. Ctr., 712 A.2d 1207 (N.J. Super. Ct. App. Div. 1998).*

---

[417] *Id.*

[418] *Id.* at 1210.

[419] *Id.*

[420] *Id.*

[421] *Proske,* 712 A.2d at 1210 (citing Continental Ins. Co. v. Herman, 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1990); In Viviano v. CBS, Inc., 597 A.2d 543 (N.J. Super. Ct. App. Div. 1991), *cert. denied,* 606 A.2d 375 (N.J. 1992)).

[422] *Id.*

[423] *Id.*

[424] *Id.*

[425] *Id.*

[426] *Proske,* 712 A.2d at 1210.

[427] *Id.*

[428] *Id.*

[429] *Id.* at 1208.

MEDICARE/MEDICAID

Medicaid Rights of Subrogation Upheld Against Due Process Challenge

The Court of Appeals of Maryland upheld a state statute giving subrogation rights to the state Medicaid program to recover medical expenses from beneficiaries, if the beneficiaries were awarded medical expenses in judgments against third-party tortfeasors.[430]

Defendants were Medicaid beneficiaries and their attorney, who after the beneficiaries were injured due to lead poisoning, successfully sued their landlord for damages they had sustained including medical expenses.[431] Because the Medicaid program had paid defendant's medical expenses, the state pursuant to statutory authority, sent a notice of subrogation to the beneficiaries' attorney.[432] After payment was refused, the state instituted an action for payment.[433] As a defense, defendants claimed the statute was unconstitutional because it violated their rights to due process.[434]

The court considered whether due process required a notice and a hearing before a lien could be placed on defendants' settlement.[435] In order to allege a violation of due process, the court held an individual had first to prove state action and the individual was being deprived of a significant property interest.[436] The court held neither the beneficiaries nor the attorney possessed a significant property interest because the medical expenses never belonged to them.[437] The beneficiaries, upon receiving the medical assistance, immediately assigned their rights to the state.[438] The attorney fees were deducted prior to any distribution.[439] Other than his fees, the attorney had no interest in the settlement.[440]

---

[430]Roberts v. Total Health Care, 709 A.2d 142, 155 (Md. App. Ct. 1998).
[431]*Id.* at 146.
[432]*Id.*
[433]*Id.*
[434]*Id.*
[435]*Roberts,* 709 A.2d at 147.
[436]*Id.*
[437]*Id.* at 147-48.
[438]*Id.* at 148.
[439]*Id.*
[440]*Roberts,* 709 A.2d at 148.

Even though the court determined defendants could not claim a lack of due process because they were not being deprived of any significant property interest, the court continued to analyze whether the statute would violate due process.[441] The court, in making its determination, weighed the state interest served by the statute against the intrusion upon the individual's rights.[442] The court concluded the state interest of preserving funds rightfully belonging to the Medicaid program outweighed the intrusion into an individual's property interest.[443] Therefore, the court found the statute did not violate due process by allowing subrogation rights to the state Medicaid program.[444] *Roberts v. Total Health Care, 709 A.2d 142 (Md. App. Ct. 1998).*

Notification of Denied Coverage Required for Medicare Beneficiaries in HMOs

The United States Court of Appeals for the Ninth Circuit held due process required legible, clear notices explaining the denial of medical services to Medicare beneficiaries enrolled in HMOs.[445]

Five Medicare beneficiaries enrolled in an Arizona HMO sued the Secretary of Health and Human Services, alleging the Secretary failed to provide adequate notice and appellate procedures for beneficiaries' denial of medical care by HMOs.[446] The district court found HMOs denied beneficiaries' due process because notices of denied medical care were often illegible, failed to specify the reason for denial, and failed to inform beneficiaries of an opportunity to present further evidence.[447] Thereafter, the district court issued an injunction mandating notices be legible, clearly state the reason for denial, and inform Medicare enrollees of all appeal rights and procedures.[448] The Secretary appealed the injunction on several grounds.[449]

---

[441] *Id.* at 150.
[442] *Id. at* 147.
[443] *Id.* at 152.
[444] *Id.*
[445] Grijalva v. Shalala, 152 F.3d 1115, 1118-19, 1123 (9th Cir. 1998).
[446] *Id.* at 1118.
[447] *Id.*
[448] *Id.* at 1119.
[449] *Id.*

Analyzing the Secretary's appeal, the court held "HMO denials of services to Medicare beneficiaries with inadequate notice constitute federal action."[450] The court noted HMOs and the federal government by contract are engaged as joint participants, providing Medicare services, such that the actions of HMOs may fairly be attributed to the federal government.[451] Actions attributed to the federal government or federal actors are subject to constitutional due process.[452] Thus, when HMOs fail to provide adequate notice, the court reasoned HMOs deny due process.[453]

Next, applying the balancing test of *Matthews v. Eldridge*,[454] the court held additional procedural protections were warranted for Medicare enrollees because the deprivation of medical care affected a substantial private interest, and because failure to provide adequate explanations for denied care created a high risk of erroneous deprivation.[455] Additionally, the court noted the Secretary failed to show added procedural protections would result in significant additional costs.[456] Finally, the court concluded the injunction's scope was not overly broad.[457] Thus, the court affirmed a grant of summary judgment and injunctive relief to Medicare beneficiaries.[458] *Grijalva v. Shalala, 152 F.3d 1115 (9th Cir. 1998).*

MENTAL HEALTH

Changes in Consent Decree Warranted When Authority Transferred and Treatment Approach Modified

The United States Court of Appeals for the First Circuit held changes in two, long-standing consent decrees governing a facility for the treatment of civilly committed sexually dangerous offenders were warranted under

[450] *Grijalva*, 152 F.3d at 1120.
[451] *Id.*
[452] *Id.* at 1119.
[453] *Id.* at 1119-21.
[454] Matthews v. Eldridge, 424 U.S. 319 (1976).
[455] *Grijalva*, 152 F.3d at 1122-23 (citing Matthews v. Eldridge, 424 U.S. 319 (1976)).
[456] *Id.* at 1123.
[457] *Id.* at 1123-24.
[458] *Id.* at 1124.

the two-pronged test of *Rufo v. Inmates of Suffolk County Jail.*[459] Accordingly, the court upheld a statute transferring sole authority to the Department of Corrections (DOC) from joint authority between the DOC and the Department of Mental Health (DMH).[460]

Plaintiffs, a group of civilly committed sexually dangerous persons, resided in the Treatment Center at the Massachusetts Correctional Institute in Bridgewater, Massachusetts.[461] In 1993, the Massachusetts legislature passed a statute transferring exclusive jurisdiction over the treatment of the civilly committed sexually dangerous residents to the DOC from joint DOC/DMH jurisdiction.[462] The court held the statute significantly changed the administration of the treatment center, and therefore, the consent decree could be changed no more than necessary to resolve the problem of transferring authority from an entity whose chief concern was treatment of the mentally ill to one whose chief concern was public safety.[463] The Original [Consent] Decree required that "patients at the Treatment Center should have the least restrictive conditions necessary to achieve the purposes of commitment."[464]

The appellate court then remanded the case to the district court to consider whether the proposed revisions satisfied the second prong of *Rufo*, that is, whether the proposed revisions were "suitably tailored" to the new statute.[465] The district court found its proposed revisions satisfied the second prong of *Rufo,* while the proposed modifications to the Supplemental Decree met both prongs of *Rufo.*[466] The Supplemental Decree permitted solitary confinement and other punishments.[467] The case again was appealed.[468] The appellate court remanded only those issues pertaining to the Supplemental Decree, while reviewing all issues relating to the Original Decree.[469]

---

[459]King v. Greenblatt, 149 F.3d 9, 11-12 (1st Cir. 1998) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992)).

[460]*Id.* at 22.

[461]*Id.*

[462]*Id.*

[463]*Id.* at 15.

[464]*King*, 149 F.3d at 15.

[465]*Id.* at 15.

[466]*Id.* at 14.

[467]*Id.* at 19.

[468]*Id.* at 16.

[469]King, 149 F.3d at 11.

The issue regarding the Original Decree was whether the 1993 statute converted the facility into a "prison" by significantly altering its mission.[470] The court held the disciplinary problems that came about as a result of the transfer to the DOC violated neither the original Decree, nor the Constitution.[471] The Supplemental [Consent] Decree struck down disciplinary and punishment procedures at odds with treatment regimens of the mentally ill.[472] Specifically, solitary confinement was to be linked to the offense underlying the original commitment of the individual, while sequestration was to be implemented only under unavoidable circumstances.[473] The court held these procedures were legitimate to resolve problems under the DOC, and suitably tailored to the change of authority.[474] Thus, the court upheld the transfer of authority to the DOC.[475] *King v. Greenblatt, 149 F.3d 9 (1st Cir. 1998).*

NEGLIGENCE

Borrowed Servant Doctrine Inapplicable to Military Physician in Private Hospital

The United States Court of Appeals for the Fifth Circuit held physicians on active duty in the United States Army, but working in private hospitals pursuant to agreement, are not borrowed servants of the private hospital, thus allowing claims of negligence to be asserted against the United States.[476]

Plaintiffs were the natural parents of their deceased daughter, Kimberly.[477] In December 1992, Kimberly was admitted to the Santa Rosa Children's Hospital (SRCH) for treatment of intestinal distress and dehydration.[478] Defendant physician was a resident affiliated with Brooke Army Medical Center.[479] Defendant was on pediatric surgical rotation at

---

[470]*Id.* at 16.
[471]*Id.* at 19.
[472]*Id.*
[473]*Id.* at 21.
[474]*King*, 149 F.3d at 22.
[475]*Id.*
[476]Starnes v. United States, 139 F.3d 540, 543 (5th Cir. 1998)
[477]*Id.* at 541.
[478]*Id.*
[479]*Id.*

SRCH on the night Kimberly was admitted.[480] The rotation at SRCH was pursuant to a Military Training Agreement, which provided military residents be assigned to a two to three month pediatric surgical rotation at SRCH.[481] The United States military paid the residents during their rotations at SRCH. On the night of Kimberly's admission, defendant, while attempting to insert an intravenous catheter, perforated the lining of Kimberly's heart causing her death.[482] Plaintiffs filed a claim under the Federal Tort Claims Act (FTCA) against the United States for negligence.[483] The United States District Court for the Western District of Texas granted summary judgment to the United States because physician was held to be a borrowed servant of SRCH.[484]

The issue before the court was whether defendant was a borrowed servant of SRCH, thereby relieving the United States of liability for negligence.[485] The court held the Military Training Agreement did not confer borrowed servant status on defendant.[486] Thus, a claim of negligence against the United States could proceed.[487] The court began its analysis with a review of the FTCA, which allows private tort claims against the United States for acts committed by its employees.[488] One defense available against such claims, the court noted, is the defense of borrowed servant.[489] Under the borrowed servant doctrine, an employer is liable for the acts of an employee assigned to the employer through *respondeat superior*.[490] The court narrowed the issue to whether the employer maintained actual control of the borrowed servant,[491] and referred to language in the Military Training Agreement (Agreement).[492]

The court found the language of the Agreement indicated residents were under the supervision and control of the teaching chief, not the

---

[480] *Id.*
[481] *Starnes*, 139 F.3d at 541.
[482] *Id.* at 541-42.
[483] *Id.* at 542
[484] *Id.*
[485] *Id.*
[486] *Starnes*, 139 F.3d at 542.
[487] *Id.* at 543.
[488] *Id.*
[489] *Id.* at 542.
[490] *Id.*
[491] *Starnes*, 139 F.3d at 542.
[492] *Id.*

assigned hospital.[493] If the United States wanted to grant control over the residents to the hospital, the court held there should have been an express provision in the Agreement.[494] Indicating the United States would be liable for the negligent acts of its residents, the court reversed and remanded the judgment of the lower court.[495] *Starnes v. United States, 139 F.3d 540 (5th Cir. 1998).*

PRIVILEGE

Peer Review Procedures of Non-Party Hospitals Not Privileged

The United States District Court for the Western District of New York required non-party hospitals to produce documents requested by plaintiffs according to the Federal Tort Claims Act (FTCA).[496]

Plaintiff patient filed a medical malpractice suit under the FTCA against defendant medical center operated by the United States government.[497] Plaintiff subpoenaed from non-party hospitals all records concerning peer review of surgical procedures undertaken by defendant physician at those hospitals.[498] The non-party hospitals refused to disclose peer review records pertaining to defendant physician on the grounds of privilege.[499]

Acknowledging the general principle that privileges are strongly disfavored in federal practice, the court found no peer review privilege existed when a cause of action was brought under federal law in federal court because a privilege for peer review materials had no historical or statutory basis in federal law.[500] Only when a new privilege promotes sufficiently important interests outweighing the need for probative evidence, the court concluded, could a court grant a new privilege.[501] The court found defendant's surgical practices to be relevant to the issue of his

---

[493] *Id.*
[494] *Id.*
[495] *Id.* at 543.
[496] Syposs v. United States, 179 F.R.D. 406, 412 (W.D.N.Y. 1998).
[497] *Id.* at 407.
[498] *Id.* at 408.
[499] *Id.*
[500] *Id.* at 410-11.
[501] *Syposs,* 179 F.R.D. at 409.

competence,[502] and therefore granted plaintiff's motion to compel non-party hospitals to produce peer review materials.[503] *Syposs v. United States, 179 F.R.D. 406 (W.D.N.Y. 1998).*

Privilege Under Medical Studies Act Denied to Hospital Records Not Created By Peer Review Committee

The Appellate Court of Illinois for the First District, Fourth Division, held under the Medical Studies Act (Act) incident and situation reports prepared prior to review by hospitals' oversight committees, as well as hospitals' responses to oversight committees' reviews, were not privileged.[504] Furthermore, the court held the same documents were not protected by attorney-client or insurer-insured privilege.[505]

In 1995, the patient was admitted to defendant hospital and placed on a ventilator.[506] Two days later, the ventilator became disconnected and the patient lapsed into a coma.[507] As a result, the patient suffered brain damage and became a non-verbal, non-responsive quadriplegic.[508] Plaintiff, the guardian of patient's estate, filed a medical malpractice/products liability suit against defendant on behalf of the patient.[509] During discovery, defendant objected to plaintiff's request for documents, claiming protection under the Medical Studies Act and attorney-client privilege.[510] Defendant, in support of its position, presented five affidavits attesting some of the reports were generated in the peer review process,[511] and some were prepared for the purpose of rendering legal opinions.[512] The trial court ordered production of the

---

[502]*Id.* at 412.
[503]*Id.*
[504]Chicago Trust Co. v. Cook County Hosp., 698 N.E.2d 641, 643 (Ill. App. Ct., 1998).
[505]*Id.*
[506]*Id.*
[507]*Id.*
[508]*Id.*
[509]*Chicago Trust,* 698 N.E.2d at 643.
[510]*Id.* at 644.
[511]*Id.*
[512]*Id.* at 645.

documents.[513] When defendant refused to comply, the trial court entered an order of contempt against defendant.[514]

Upon appeal, the court found the documents in were not initiated, created, prepared or generated by the peer review committee, and thus not protected under the Act.[515] Instead, the documents were created in the ordinary courts of the hospital's medical business, for the rendering of legal opinions, to weight potential liability risk, or for future corrective action by the hospital staff.[516] Additionally, the court found when documents created by hospital employees were not created as client-attorney or insurer-insured communications, they did not fall within the scope of attorney-client or insurer-insured privilege.[517] Accordingly, the ruling of the trial court was upheld.[518] *Chicago Trust Co. v. Cook Cty. Hosp., 698 N.E.2d 641 (Ill. App. Ct. 1998).*

PROCEDURE

Total Cost of Injunctive Relief in Excess of $75,000 Satisfies Diversity

The United States District Court for the Southern District of New York held diversity jurisdiction requirements were satisfied when the total cost of injunctive relief exceeded $75,000, even if the monetary value to any one plaintiff could not be determined.[519]

On December 22, 1997, plaintiff, a user of Rezulin, filed an action against defendant pharmaceutical company.[520] Defendant manufactured Rezulin, a pharmaceutical used in the treatment of diabetes.[521] Plaintiff alleged use of Rezulin created substantial health risks.[522] Plaintiff sought injunctive relief requiring defendant to warn users of Rezulin about the

---

[513] *Id.*
[514] *Chicago Trust*, 698 N.E.2d at 645.
[515] *Id.* at 645.
[516] *Id.*
[517] *Id.* at 650-51.
[518] *Id.* at 651.
[519] Katz v. Warner-Lambert Co., 9 F. Supp. 2d 363, 365 (S.D.N.Y. 1998).
[520] *Id.* at 363.
[521] *Id.*
[522] *Id.*

drug's potential harms, monitor Rezulin users for side effects, and to fund research to cure the side effects.[523]

The issue before the court was whether defendant satisfied the requirements for diversity jurisdiction pursuant to 28 U.S.C. § 1331,[524] specifically, whether the amount in controversy exceeded $75,000.[525] Defendant's motion to remove the case to federal court because the amount involved exceeded $75,000 was granted.[526] Plaintiff moved to remand the case back to state court by arguing the amount did not exceed $75,000.[527] The court held the putative amount would exceed $75,000 and was properly removed to federal court.[528]

Faced with determining the monetary value of the benefit received through injunctive relief to any one Rezulin user,[529] the court concluded the cost of burdening defendant with the requirements of the injunctive relief would undoubtedly cost more than $75,000 given the scope of the research required under the injunction.[530] In addition, the court also concluded even if Rezulin users partially funded the research, the final costs to defendant in implementing the requirements of the injunction would exceed $75,000.[531] Accordingly the court held the case was properly removed to federal court.[532] *Katz v. Warner-Lambert Co., 9 F. Supp. 2d 363 (S.D.N.Y. 1998).*

PRODUCTS LIABILITY

Massachusetts Adopts Hindsight Approach in Duty to Warn Cases

The Supreme Judicial Court of Massachusetts held a hindsight approach applied to the implied warrant of merchantability in finding a

[523] *Id.*
[524] *Katz*, 9 F. Supp. 2d at 363.
[525] *Id.*
[526] *Id.*
[527] *Id.*
[528] *Id.*
[529] *Katz*, 9 F. Supp. 2d at 363.
[530] *Id.*
[531] *Id.*
[532] *Id.*

manufacturer of silicone gel implants liable for damages resulting from the rupture of an implant.[533]

In 1977, plaintiff underwent surgery in which she had silicone gel breast implants, manufactured by Heyer-Schultz in 1976, implanted.[534] After experiencing chest pain in 1992, plaintiff had a mammogram.[535] The results of the mammogram revealed the implants had ruptured and leaked.[536] The silicone gel implants were subsequently removed in 1993.[537] As a result of the release of silicone gel into plaintiff's body, plaintiff suffered several medical ailments including permanent scarring of her pectoral muscles and an auto-immune disease.[538]

The court upheld the lower court's ruling, which found the implants were negligently designed and accompanied by a negligent product warning.[539] The court announced its decision would revise Massachusetts law regarding duty to warn in products liability cases.[540] Massachusetts would now apply a retrospective application or "hindsight approach" to the implied warranty of merchantability.[541] The announced purpose of the court's revision was to bring Massachusetts in line with the majority of jurisdictions, as well as the RESTATEMENT SECOND OF TORTS, and to reconcile inconsistencies in the application of Massachusetts law.[542] Accordingly, a defendant would not be liable under implied warranty of merchantability for failing to warn about risks not foreseeable at the time of the sale or which could not have been reasonably discovered through testing.[543] The court affirmed the Superior Court decision, which held defendant liable for damages resulting from a ruptured silicone breast implant. *Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909 (Mass. 1998).*

---

[533]Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 924 (Mass. 1998).
[534]*Id.* at 912.
[535]*Id.*
[536]*Id.*
[537]*Id.*
[538]*Vassallo*, 696 N.E.2d at 912-13.
[539]*Id.* at 912.
[540]*Id.*
[541]*Id.* at 922.
[542]*Vassallo*, 696 N.E.2d at 922.
[543]*Id.* at 923-24.

REFUSAL OF TREATMENT

ERISA Preempts Negligence Claims Based on Improper Denial of Pre-authorization for Medical Treatment

The United States District Court for the District of Massachusetts held negligence claims based upon a refusal to grant pre-authorization by a third-party administrator were preempted by ERISA.[544]

Plaintiff alleged negligent medical treatment and improper processing of benefit claims after being severely disfigured following an attempted suicide by self-immolation.[545] Plaintiff's health insurance plan was obtained through her spouse's employer and had a pre-authorization clause for psychiatric hospitalization.[546] Plaintiff had been diagnosed at the age of seventeen with bipolar disorder and had previously been successfully treated at McLean Hospital (McClean).[547] On September 21, 1994, plaintiff was diagnosed as acutely psychotic and sought hospitalization at McClean.[548] However, defendant Private Healthcare Systems, a third-party administrator responsible for utilization review and pre-authorization, denied plaintiff's request to be hospitalized at McClean and instead, authorized hospitalization at two other facilities.[549] Plaintiff's condition worsened after hospitalization at one of the pre-authorized facilities.[550]

Plaintiff sued seeking compensatory damages for loss of consortium.[551] Defendants claimed ERISA preempted state law claims and sought dismissal in district court.[552] Plaintiffs argued ERISA preemption was inappropriate because the claims did not relate to an employee benefit plan under ERISA.[553] Defendant's decision, plaintiff contended, went beyond the scope of ordinary utilization review and

---

[544]Danca v. Emerson Hosp., 9 F. Supp. 2d 27, 32 (D. Mass. 1998).
[545]*Id.* at 30.
[546]*Id.*
[547]*Id.*
[548]*Id.*
[549]*Danca*, 9 F. Supp. 2d at 30.
[550]*Id.*
[551]*Id.*
[552]*Id.*
[553]*Id.*

amounted to participation in medical treatment decisions.[554] The court found the argument irrelevant because claims for negligent treatment decisions would also be pre-empted by ERISA.[555] The court however noted, had plaintiffs sought relief before the injury occurred, the court would have had the authority to provide prospective relief for benefits allegedly due under the plan, if there were an imminent threat to health or life.[556] Because plaintiff's claims related to an ERISA plan, the court found the claims preempted by ERISA.[557] Accordingly, defendant's motions to dismiss were allowed.[558] *Danca v. Emerson Hosp., 9 F. Supp. 2d 27 (D. Mass 1998).*

REPRODUCTIVE RIGHTS

Statute Banning Partial-Birth Abortion Unconstitutional

The United States District Court for the Southern District of Iowa granted plaintiff's request for a preliminary injunction to enjoin an Iowa statute banning partial-birth abortions because the court held the Iowa statute was vague and unduly burdened a woman's constitutional right to an abortion.[559]

The Iowa statute banning partial-birth abortions prohibited a person from knowingly performing or attempting to perform a partial-birth abortion.[560] The statute defined a partial-birth abortion as "an abortion in which a person partially vaginally delivers a living fetus before killing the fetus and completing the delivery."[561] A violation of the statute was a

---

[554]*Danca*, 9 F. Supp. 2d at 30.

[555]*Id.*

[556]*Id.* at 31.

[557]*Id.*

[558]*Id.* at 32.

[559]Planned Parenthood of Greater Iowa v. Miller, 1 F. Supp. 2d 958, 963 (S.D. Iowa 1998).

[560]*Id.* at 961 (citing 1998 Iowa Legis. Serv. 2073 (West) to be codified at IOWA CODE § 707.8A (1998)).

[561]*Id.* (citing 1998 Iowa Legis. Serv. 2073 (West) to be codified at IOWA CODE § 707.1C (1998)).

class C felony, mandating a maximum ten-year prison sentence and a fine of $500 to $10,000.[562]

The court held the statute vague because the prohibitions of the statute were not clearly defined thereby inhibiting the exercise of a constitutionally protected right.[563] The court accepted plaintiff's argument because the medical community did not recognize the term partial-birth abortion the statute's language could lead to the prohibition of other types of abortions.[564] Specifically, the court noted the statute was unclear in defining a "living fetus" and in whether partial vaginal delivery meant delivering an intact fetus or part of a fragmented fetus.[565] The court held the statute constituted an undue burden on a woman's right to an abortion as protected under the United States Constitution because the language of the statute was broad enough to encompass all pre-viability abortion procedures.[566] The court concluded the statute would likely be invalid and unconstitutional.[567] Accordingly, the court granted the preliminary injunction.[568] *Planned Parenthood of Greater Iowa, Inc. v. Miller, 1 F. Supp. 2d 958 (S. D. Iowa 1998).*

Hospitalization for Abortions After First Trimester, Informed Consent, and Two-Day Waiting Period Constitutional

The Court of Appeals of Tennessee upheld several abortion regulations, including hospitalization for abortions after the first trimester, informed consent, and a two-day waiting period.[569] The court invalidated emergency medical exceptions to the regulations because it found such exceptions too narrow.[570]

---

[562] *Id.*
[563] *Id.* at 962.
[564] *Planned Parenthood*, 1 F. Supp. 2d at 962.
[565] *Id.*
[566] *Id.* at 963.
[567] *Id.*
[568] *Id.* at 964.
[569] Planned Parenthood of Middle Tenn. v. Sundquist, No. 01A01-9601-CV-00052, 1998 WL 467110, at * 47-48 (Tenn. Ct. App. Aug. 12, 1998), *reh'g denied* (Sept. 2, 1998).
[570] *Id.*

The court first noted it would review the statutes' unambiguous language, as intended by the legislature.[571] Next, the court noted, under an individual's right to privacy, the Constitution of Tennessee protected both a woman's right to procreate and her right to avoid procreation.[572] Adopting the undue burden standard of *Planned Parenthood v. Casey*,[573] the court reviewed the challenged provisions.[574] The court concluded requiring hospitalization for abortions performed after the first trimester, but before viability, was constitutional.[575] Additionally, the court noted outright abortions could be performed in physicians' offices or outpatient clinics.[576] Hospitalization did not amount to an undue burden, because hospitalization, the court reasoned, promoted enhanced safety in the case of complications due to late term abortions.[577] Informed consent from the treating physician did not constitute an undue burden, but rather ensured counseling regarding the profound significance of a woman's decision to have an abortion.[578] Also, the court found no factual basis suggested a two-day waiting period before an abortion unduly burdened a woman's procreative autonomy.[579]

The court did hold the emergency medical exceptions to the abortion regulations unconstitutional.[580] The court noted exceptions to the abortion regulations were restricted to life-threatening and serious health-threatening conditions.[581] Tennessee only excepted life-threatening conditions; thus, the exceptions were too narrow creating an undue burden on a woman's right to procreational autonomy.[582] Finally, the court noted the waiting period and counseling by the treating physician taken together created an undue burden on the staff of abortion clinics, creating undue delay in obtaining an abortion.[583] The court mandated neither regulation

---

[571] *Id.* at *8-9.
[572] *Id.* at *8.
[573] *Sundquist*, 1998 WL 467110 at *23 (citing Planned Parenthood v. Casey, 505 U.S. 833 (1992)).
[574] *Id.* at *23-24. (*See Casey*, 505 U.S. at 877-78).
[575] *Id.* at *28.
[576] *Id.*
[577] *Id.* at *29-32 *passim*.
[578] *Sundquist*, 1998 WL 467110 at *32-34.
[579] *Id.* at *41-46.
[580] *Id.* at *47-48.
[581] *Id.* at *47.
[582] *Id.* at *48.
[583] *Id.* at *48-50.

be enforced until the legislature determined which was more important.[584] The case was remanded for further consideration consistent with the opinion.[585] *Planned Parenthood of Middle Tenn. v. Sundquist, No. 01A01-9601-CV-00052, 1998 WL 467110 (Tenn. Ct. App. Aug. 12, 1998), reh'g denied (Sept. 2, 1998).*

Mandatory Consultation, 24-Hour Delay, Parental Consent For Minors Before Abortion Constitutional

The Supreme Court of Mississippi held the Mississippi State Constitution's (Constitution) right to privacy included the implied right to obtain an abortion.[586] The court further held mandatory consultation, twenty-four-hour delay, and parental consent for minors did not create undue burdens, and were therefore constitutional.[587]

Physicians, health clinics, and organizations dedicated to reproductive rights challenged the constitutionality of Mississippi abortion laws.[588] Plaintiffs alleged the regulations violated the Constitution's rights to privacy, bodily integrity, due process, and freedom from governmental interference in medical decisions.[589] The chancery court found the Constitution contained a specific right to abortion and the restrictions were constitutional.[590] Plaintiffs appealed.[591]

Addressing arguments the Constitution did not protect a right to abortion because abortion was illegal at the time of drafting, the court rejected the State's interpretation the framers intended to preclude protection of abortion.[592] The court held because abortion was only illegal after quickening, the State's argument was meritless.[593] Additionally, the court concluded, even though abortion was not explicitly mentioned in the

---

[584] *Sundquist*, 1998 WL 467110 at *48-50.
[585] *Id.*
[586] Pro-Choice Miss. v. Fordice, 716 So. 2d 645, 654 (Miss. 1998).
[587] *Id.* at 655-60 *passim.*
[588] *Id.* at 648-49.
[589] *Id.* at 649.
[590] *Id.*
[591] *Fordice*, 716 So. 2d at 649.
[592] *Id.* at 650-51.
[593] *Id.*

Constitution, there was no more sacred right than the right of each individual to the possession and control of his own person.[594] The court concluded the right of autonomous bodily integrity and a penumbra of the right to privacy protected an implicit right to abortion.[595]

Before reviewing the abortion regulations' constitutionality, the court noted previous decisions regarding the right of privacy applied strict scrutiny.[596] However, because of the complex rights of a woman's privacy and the rights of unborn life, the court decided a different standard was appropriate.[597] The court adopted the *Casey* undue burden test, which held a restriction on abortion is constitutional, if it is legitimate and does not create an undue burden.[598] Analyzing plaintiffs' claims, the court held mandatory consultation and twenty-four-hour delay ensures a woman has given thoughtful consideration in deciding to have an abortion.[599] Such a legitimate purpose did not amount to an undue burden and was therefore constitutional.[600] Lastly, the court held parents could provide the emotional and moral support a minor needed in deciding to have an abortion.[601] Thus, the parental consent restriction, which included a judicial bypass, did not amount to an undue burden and was constitutional.[602] Accordingly, the court affirmed the decision of the lower court.[603] *Pro-Choice Mississippi v. Fordice, 716 So. 2d 645 (Miss. 1998).*

STATUTE OF LIMITATIONS

Statute of Limitations Bars Plaintiff's Claim Against Tobacco Defendant

The Court of Appeals of Florida, First District, held the statute of limitations barred plaintiff's claim of product liability against defendant

---

[594] *Id.* at 653 (quoting *In re* Brown, 478 So. 2d 1033, 1039 (Miss. 1985)).
[595] *Id.*
[596] *Fordice*, 716 So. 2d at 655.
[597] *Id.*
[598] *Id.*
[599] *Id.* at 656.
[600] *Id.*
[601] *Fordice*, 716 So. 2d at 660.
[602] *Id.*
[603] *Id.* at 666.

tobacco company.[604] The court also held claims regarding labeling practices were preempted by the 1965 Federal Labeling Act, thereby barring plaintiff's claim regarding defendant's labeling practices.[605] The court held the admissibility claims raised at trial, but never addressed within the complaint regarding Brown & Williamson should have been barred from trial, but was not reversible error.[606] Finally, the court held speculative testimony by two plaintiff's witnesses, while erroneously admitted, was not reversible error.[607]

Plaintiff began smoking in 1947 and continued until January 1991.[608] Plaintiff smoked Lucky Strikes, a product of the American Tobacco Company (ATC), which was later transferred to Brown & Williamson.[609] On January 29, 1991, plaintiff began coughing blood.[610] Plaintiff immediately notified his physician, who saw him on February 4, 1991.[611] On February 14, 1991, a pulmonary specialist confirmed the diagnosis of lung cancer.[612]

Regarding the first issue, the court based its ruling on the point at which plaintiff had or should have had notice of the relationship between his injury and defendant's product.[613] The court found plaintiff had discovered his medical condition on February 4, 1991, when he coughed and spitted blood.[614] Plaintiff's assertion discovery of the injury resulting from defendant's acts should be left to a jury was dismissed because the court found a jury could have reasonably concluded plaintiff was aware of his injury on that date.[615] In addition, the court noted plaintiff filed his claim on February 10, 1995, four years after the date of discovery.[616] Therefore, the statute of limitations had expired barring plaintiff's claim.[617]

---

[604]Brown & Williamson Tobacco Corp. v. Carter, 723 So. 2d 833, 838 (Fla. Dist. Ct. App. 1998) (per curiam), *reh'g denied* 1998 WL 906838 (Fla. Dist. Ct. App. Dec. 31, 1998).

[605]*Id.*

[606]*Id.*

[607]*Id.*

[608]*Id.* at 834.

[609]*Brown & Williamson,* 723 So. 2d at 834.

[610]*Id.* at 835.

[611]*Id.*

[612]*Id.*

[613]*Id.* at 836.

[614]*Brown & Williamson,*723 So. 2d at 836.

[615]*Id.* at 835 (citing Copeland v. Armstrong Cork Co., 447 So. 2d 922 (Fla. 1984)).

[616]*Id.*

[617]*Id.* at 836-37.

The holding regarding the second issue was based upon the 1969 Federal Labeling Act (Act), which preempted state labeling laws and subsequently barred claims based upon labeling practices.[618] Plaintiff contended the Act's reference to "advertising or promotional materials" did not apply to the label on cigarette packages.[619] However, the court held prior case law interpreted the statute clearly to pertain to all "forms of communication directed to a mass market."[620] The label issue asserted by plaintiff raised post-1969 federal labeling act questions; therefore, the court held plaintiff's assertion about labeling practices could not be addressed due to federal labeling act preemption.[621]

The third issue before the court was whether documents presented at trial by plaintiff regarding trade practices by defendant amounted to an unpleaded claim against defendant independently, not as "successor to ATC."[622] In resolving the issue, the court focused on the substance of the documents indicating defendant's failure to disclose important research information to the United States Surgeon General.[623] The court found the information irrelevant to common trade knowledge of the tobacco industry as a whole. Therefore, the court held, while it was inappropriate to allow the admission at trial of the documents, it was not reversible error.[624]

The fourth issue before the court involved speculative testimony by plaintiff and plaintiff's witness.[625] The court noted, as a general rule, speculative testimony was not reversible error,[626] but the court found the particular testimony in question insignificant.[627] Accordingly, the court reversed judgment for plaintiffs.[628] *Brown & Williamson Tobacco Corp. v. Carter, 723 So. 2d 833 (Fla. Dist. Ct. App. 1998) (per curiam), reh'g denied 1998 WL 906838 (Fla. Dist Ct. App. Dec. 31, 1998).*

---

[618] *Id.* (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)).

[619] *Id.* at 837.

[620] *Brown & Williamson*, 723 So.2d at 837 (citing Griesenbeck v. American Tobacco Co., 897 F. Supp. 815 (D.N.J. 1995)).

[621] *Id.*

[622] *Id.*

[623] *Id.*

[624] *Id.*

[625] *Brown & Williamson*, 723 So. 2d at 838.

[626] *Id.*

[627] *Id.*

[628] *Id.*

TORTS

Release of Patient's Medical Records Not Invasion of Privacy or Infliction of Emotional Distress

The Court of Appeals of Missouri granted plaintiff hospital's motion for summary judgment against defendant patient's counterclaim for invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress.[629]

Plaintiff sued defendant patient for unpaid charges.[630] Defendant filed a counterclaim for invasion of privacy, intentional infliction of emotional distress and negligent infliction of emotional distress because plaintiff released defendant's medical records to defendant's former spouse.[631] The court granted summary judgment in favor of plaintiff on the invasion of privacy claim because defendant failed to prove his estranged spouse unreasonably obtained information about his private subject matter.[632] The records at issue dealt with defendant's psychiatric admission while at plaintiff hospital.[633] Defendant's spouse subpoenaed them in the course of divorce proceedings.[634]The court granted summary judgment in favor of plaintiff on the claim of intentional infliction of emotional distress because plaintiff's conduct in releasing the records was not so extreme and outrageous as to exceed the possible bounds of decency.[635] At most, the court observed, plaintiff's conduct amounted to an oversight.[636]

The court granted summary judgment in favor of plaintiff on the claim of negligent infliction of emotional distress because defendant failed to establish his distress was medically diagnosable or of sufficient severity to be medically significant.[637] Defendant only asserted he suffered

---

[629]St. Anthony's Med. Ctr. v. H.S.H., 974 S.W.2d 606, 613 (Mo. Ct. App. 1998).
[630]*Id.* at 608
[631]*Id.*
[632]*Id.*
[633]*Id.*
[634]*St. Anthony's,* 974 S.W.2d at 608.
[635]*Id.* at 611.
[636]*Id.*
[637]*Id.* at 612-13.

humiliation, shame, and severe emotional distress.[638] Accordingly, the court affirmed the trial court's judgment and dismissed the case with prejudice.[639] *St. Anthony's Med. Ctr. v. H.S.H., 974 S.W.2d 606 (Mo. Ct. App. 1998).*

WORKERS' COMPENSATION

Benefits Denial Upheld Against Veteran Who Participated in LSD Treatment

The United States Court of Veterans' Appeals found plaintiff's current medical condition, including schizophrenia, was not aggravated or caused by LSD treatment in the Veterans' Administration (VA) medical system.[640]

In May 1966, plaintiff, a veteran who had served in the United States Army from 1953 to 1955, was admitted to a VA hospital for reactive depression with severe anxiety, mild hysterical features, excessive denial, and borderline intelligence.[641] In October 1967 plaintiff consented to participate in an investigational study of the drug lysergic acid diethylamide (LSD-25).[642] After one session, plaintiff withdrew from the study and left the hospital against medical advice.[643] Plaintiff returned to a VA hospital in 1981 for medical care.[644] At that time plaintiff was diagnosed with "organic brain syndrome--Temporal lobe disorder--? Probably cerebral cortical atrophy."[645] As a result of his condition, plaintiff was found to be disabled for purposes of employment.[646]

In May 1983 plaintiff submitted a claim for benefits to the VA alleging his current condition was attributable to the LSD-25 treatment.[647] In connection with plaintiff's claim, a physician reviewed plaintiff's

---

[638] *Id.* at 613.
[639] *St. Anthony's*, 974 S.W.2d at 613.
[640] Boggs v. Sec'y of Veterans Affairs, 11 Vet. App. 334, 345 (Vet. App. 1998).
[641] *Id.* at 336.
[642] *Id.*
[643] *Id.*
[644] *Id.*
[645] *Boggs*, 11 Vet. App. at 336.
[646] *Id.*
[647] *Id.* at 336-37.

medical records and concluded plaintiff was suffering from conditions relating to both alcohol abuse and LSD treatment.[648] Plaintiff reopened the current claim in 1993 after the Board of Veterans' Appeals denied multiple claims for benefits because it found no causal connection between the LSD treatment and plaintiff's current condition.[649]

The court found the Board did not commit any error in denying plaintiff's claim or by refusing to accept medical opinions from plaintiff unsupported by medical evidence. [650] The court found plaintiff was not entitled to de novo review of his claim denial because a change in regulations since his previous denial did not apply to the VA claim.[651] The Board, therefore, erred by failing to require new material evidence to reopen the claim, but the court held the error was harmless because the Board treated the Veteran's appeal as a new claim.[652] Additionally, the court found the Board did not commit error by giving more credibility to one examiner over another.[653] Therefore, the court affirmed the Board's denial of benefits.[654] *Boggs v. Secretary of Veterans Affairs, 11 Vet. App. 334 (Vet. App. 1998).*

Employee Injured in Common Area of Building Has Claim Against Employer

The Supreme Court of New Jersey held employees injured in common areas of buildings have compensable workers' compensation claims against their employers, if the employer exhibits control of the common area.[655]

In 1985, defendant garment manufacturer hired plaintiff employee as a fabric presser.[656] Defendant's business was located on the fourth floor

---

[648]*Id.* at 337.

[649]*Id.* at 338.

[650]*Boggs*, 11 Vet. App. at 340 (discussing Black v. Brown, 5 Vet. App. 177 (1993); Swann v. Brown, 5 Vet. App. 229 (1993); Reonal v. Brown, 5 Vet. App. 458 (1993); Guimond v. Brown, 6 Vet. App. 69 (1993)).

[651]*Id.* at 342.

[652]*Id.* at 343.

[653]*Id.* at 344.

[654]*Id.* at 345.

[655]Ramos v. M & F Fashions, Inc., 154 A.2d 486, 494 (N.J. 1998).

[656]*Id* at 489.

of a five-story building in Newark, New Jersey.[657] The building's elevator serviced the entire building, including defendant's business. Many people avoided the elevator, which plaintiff attributed to the elevator's door remaining open during use.[658] However, plaintiff used the building's elevator routinely in the course of his employment, including his arrival and departure from the building.[659] Although plaintiff was not required to begin work until 8:00 a.m., he typically arrived each day at 7:00 a.m.[660] Plaintiff's superiors knew of his habit of arriving early, which they commented made him their best employee.[661]

On May 13, 1988, upon arriving early to work, plaintiff entered the elevator and fell approximately eight to ten feet down the elevator shaft.[662] Plaintiff was severely injured as a result of his fall and was unable to work.[663] Plaintiff filed an action against the landlord of the building, as well as a workers' compensation claim.[664] Defendant went out of business shortly after the accident, and therefore did not defend plaintiff's workers' compensation claim.[665] However, the Second Injury Fund (SIF) opposed plaintiff's claim for benefits.[666]

At the hearings, plaintiff's expert witnesses testified plaintiff was permanently disabled as a result of the accident.[667] The compensation court determined plaintiff was permanently and totally disabled in the course of employment, and was therefore entitled to benefits.[668] The Appellate Division reversed.[669] The Supreme Court of New Jersey determined defendant controlled the elevator because it was used during the course of business.[670] The court held the evidence established the employer used the elevator for its business purposes, which implied the employer could authorize its use for other purposes such as coming to and

---

[657] *Id.*
[658] *Id.*
[659] *Id.*
[660] *Ramos*, 154 A.2d at 489.
[661] *Id.*
[662] *Id.*
[663] *Id.*
[664] *Id.*
[665] *Ramos*, 154 A.2d at 489.
[666] *Id.*
[667] *Id.*
[668] *Id.* at 489-90.
[669] *Id.* at 490.
[670] *Id.* at 491.

from work.[671] Therefore, because the plaintiff was permanently disabled within the premises of his employer, he was entitled to compensation.[672] Accordingly, the court upheld the trial court's award of benefits.[673] *Ramos v. M. & F. Fashions, 154 A.2d (N.J. 1998).*

CORRECTION

In *Pregnant Mother's Right to Refuse Treatment Beneficial to Her Fetus: Refusing Blood Transfusions* by James A. Filkins, M.D., which appeared in Vol. 2, No. 2, an editorial error resulted in a misstatement of a court's ruling. The second full paragraph on page 363 of Dr. Filkins's article should have read: *"In re Fetus Brown* represents a court's use of such a balancing test. The Appellate Court of Illinois, First Division, determined the state's interest in the well-being of a viable fetus **did not** outweigh the patient's right to refuse medical treatment for religious reasons. (citations omitted)." The DEPAUL JOURNAL OF HEALTH CARE LAW apologizes to Dr. Filkins for the error.

[671] *Id.* at 494.
[672] *Id.*
[673] *Id.*